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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 319.

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vs.

H. H. HAYWARD, TREASURER ETC., ET AL., *Appellees*.

Appeal from United States Circuit Court for the District of Kansas.

ARGUMENT OF EDWARD S. ISHAM FOR APPELLANT.

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This cause comes up on appeal from the Circuit Court of the United States for the District of Kansas. It was heard upon demurrer to the bill of complaint, so that we are remitted to the allegations of that bill for the facts upon which the questions involved arise. Under contract with certain railroad corporations operating lines of road in Kansas, sleeping, drawing room and parlor cars of the appellant are performing a service of inter-state transportation of passengers, in the course of which they are brought from time to time, into the state of Kansas. In the performance of that service they run into and out of that state, and across it. Under the statutes of the state which

provide for the taxation of the rolling stock of railways taxes are levied upon the sleeping and other cars of the appellant, and for the purpose of collecting the tax thus laid upon the property, they are assessed as the other rolling stock is assessed of railway companies, and it is provided that the railroad company "operat-" ing or using said cars shall be held liable for the taxes "due thereon." The bill of complaint and demurrer and certain portions of the statutes of Kansas are set out in the brief of the attorney-general of Kansas filed in this case. The bill was filed by the appellant as the owner of the property upon which these taxes are laid, to enjoin their collection upon the ground that they were unlawfully levied. It is claimed that the taxes are so unlawfully levied because the domicil of the owner is in another state, namely, the state of Illinois, at which domicil the property is taxed; and that said property never comes within the territory of the state of Kansas except when it enters the state in the course of its employment in the inter-state transportation of railway passengers. The cars in question, upon which the tax is levied, are used exclusively in such inter-state commerce. The conditions under which they enter the state are such as preclude the idea of remaining there, for they never enter except for the purpose of such inter-state service; and therefore the state acquires no jurisdiction of such property for the purpose of taxation. Under these conditions the cars of the appellant never become blended in the general mass of property in the state, nor acquire any *situs* there, nor can be taken to be doing business within the state in any sense which gives the state jurisdiction for local taxation. In the case of *The Pullman Company* v. *The*

Commonwealth of Pennsylvania, Number 6 of this calendar, in connection with which this case has been ordered to be heard, the identical question is presented which arises on this record. In the present case the tax is levied directly upon the coaches which are the property of the appellant; in the Pennsylvania case they are levied upon capital stock, which is equally a tax upon the property and assets of the company. It is unnecessary to repeat that argument here, and for simplicity and convenience we ask leave upon this subject respectfully to refer the court to the argument filed in the case of the Commonwealth of Pennsylvania. The same principles must govern equally in that case and in this. A copy of the argument is for convenience of reference appended hereto.

It is to be remembered that these Kansas lines represent the through lines, not merely between the connecting states, but from Canada to Mexico. If the power of the state to tax, which is asserted in this case, is sustained, and upon the ground on which it is asserted, then Congress can no longer have control of this subject-matter even for the purposes of a commercial treaty with a foreign power. In the case of the *Central R. R. Co.* v. *State Board of Assessors*, 49 N. J. Law, 1, the tax was, as in this case, on the property, and so, in terms, it purported to be under the statute of Tennessee, considered in the *Pickard* case.

The suggestion is made that the appellant stands in the relation of a third party and of a stranger to this taxation, because the tax is assessed against the railway company, and that the relations between the rail-

way company and the appellant give it no right of interference.

If the tax were clearly lawful, and the only dispute originated under our contract with the railway company as to which of us should pay it, it might be proper that it should be paid without objection and the issue be settled afterwards by litigation, if necessary, with the railway company. But if the tax itself is illegal, and ought not to be imposed or collected, then the place to check the evil is at the point where it arises. For we ought not to be subjected to costly and irritating litigation with all these various railway companies, with whom we are now amicably conducting our business under our contracts, over a subject-matter of controversy that ought never to have arisen at all.

It will be observed that the tax is levied upon the property of the appellant, although the railway company is made liable for its payment. The property upon which the tax is laid, therefore, is the property of the appellant, although the companies operating and using the property are made liable for the payment. Such liability of the railway company does not exempt the property from seizure and sale if the railway company either will not, or, as may very well happen, cannot pay; and we may protect our own property from taxation and seizure, whoever may be made also liable for its payment.

In this connection we submit the following citation from the *Cyclopædia of Political Science, Political Economy and United States History*, Vol. 3, p. 874, Title, TAXATION.

"This claim involves a dangerous inaccuracy, and arises from a confusion of the idea of the assessment with the idea of the tax.

These two stand upon altogether different bases. The *assessment* is to the person in respect to the property; but the *tax* is to the property in respect to itself alone. In the order of consequence, a tax goes before an assessment. A tax stands upon an existing relation between the property and the state, as protector and protected, and is that portion of the public burden which the property ought to bear because of that existing *relation*. An assessment stands upon the existing relation between the property and its owner or possessor; it follows the tax, and is merely the method of securing it. The danger, in saying that the tax is to the *person in respect of his property*, is, that, by the form of the expression we justify an assessment upon a person for all property indiscriminately. We transpose the subjects, and make the law seek out the person, and then tax him according to his property, instead of first seeking property which it has a right to tax, and then as a secondary matter, a person to whom it may be assessed. Even if a knowledge of the property is obtained by inquiry addressed to the owner in the shape of a general assessment, still the rationale of the matter presupposes the right to tax on account of the property and our relation to it directly. If we disregard this rationale, we may, perhaps, register an assessment where we are not entitled to levy a tax.

The person to whom the assessment is made need not be the owner. He may be the agent, trustee, guardian, executor or administrator. This is because the property, which owes the tax by reason of being protected, has not hands wherewith to take from itself a portion of itself to pay for protection to be accorded to the remainder. Therefore the law, following the property to get the tax, makes its demand upon whomever it finds in possession, without inquiring upon what interest the property is based.

According to the theory of our government, a tax stands upon the just obligation of all property to contribute to the support of the power which protects it; but the assessment stands upon the possession or power of the person assessed, over the property taxed."

It is clear that it is the office of a court of chancery to enjoin the collection of a tax when it is levied without authority of law or when the property assessed is not subject to taxation. *Allwood* v. *Cowen et al.*, 111 Ill.

486. As has been already said, the appellant must have the right to protect its own property from the unlawful imposition of a tax by means of which its property may be subjected to seizure and sale. While the railway companies are made liable for the payment of the tax, the property is not thereby exempted, and the railway company may not be able, and it has often happened that railway companies have not been able to pay such indebtedness for taxation and to exonerate the property until after the opportunity and time for relief are gone.

Argument for Plaintiff in Error.

The facts upon which the questions here arise are equally free from dispute and from complication. They are found, and stated, in the opinion of the Pennsylvania Court of Common Pleas and appear in the record on pages 53 and 56. The case was one at common law, and under the provisions of a statute of Pennsylvania was by stipulation (Record, page 15) submitted to the court without the intervention of a jury. Under that law the finding of the court upon the facts is conclusive in any appellate proceeding. *Jamison* v. *Collins*, 88 Pa. St., 359; *Lee* v. *Keys*, 88 Pa. St., 175; *Griffith* v. *Sitgreaves*, 90 Pa. St., 161; *Brown* v. *Dempsey*, 95 Pa. St., 243; *Brown, Early & Co.* v. *Susquehanna Boom Co.*, 109 Pa. St., 57; *Gonser* v. *Smith*, 115 Pa. St., 452. This record comes up from the Supreme court of Pennsylvania and not from the Circuit court of the United States. The issues here must, therefore, be confined to inquiry whether that Supreme court erred upon the facts certified to it from the Common Pleas. *National Bank* v. *Commonwealth*, 9 *Wallace, 363*. The statement of facts by that court is as follows:

"Defendant is a corporation of the State of Illinois, having its principal office in Chicago. Its business was during all the time for which tax is charged to furnish sleeping coaches and parlor and dining room cars to the various railroad companies with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who

traveled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping berths, and other conveniences. Business has been carried on continuously by defendant in this way in Pennsylvania since February 17, 1870, and it has about one hundred coaches and cars engaged in this way in the State during that time." (Record, p. 53, folio 85.)

"The cars used in this State have, during all the time for which tax is charged, been running into, through and out of this State." (Record, p. 56, folio 94.)

An exception was taken to a finding of the court in the following terms (Record, page 55, folio 91):

"The court erred in not finding as a fact that the cars used in the state of Pennsylvania were also used in other states, their use in Pennsylvania being confined to passages to or from points in other states."

Upon this exception the court (Record, page 56, folio 94) found as follows:

"By the COURT:

We found, as one of the facts in the opinion filed, that 'the cars used in this state have, during all the time for which tax is charged, been running into, through and out of this state,' a finding which in substance *meets the third exception.*"

The question here then is of the power of Pennsylvania to tax the capital stock of a foreign corporation engaging in no other business within her borders than the inter-state transportation of railway passengers. If other questions may be imagined they do not arise on this record. That is the one question designed to be raised and is the one question which the court below decided by the ruling now reviewed.

On account of the business thus engaged in and of the presence in the state of Pennsylvania, for the purpose of such business only, of certain railway cars of the plaintiff in error, the State of Pennsylvania assumed

to impose a tax upon the capital stock of the Illinois corporation, and accordingly the Auditor General and State Treasurer in February, 1881, assumed that *a portion* of the capital of that corporation should be deemed to have a *local investment* in the State of Pennsylvania; and they *estimated* such proportion of the capital stock to be thus constructively there as would be represented by the proportion which the number of miles run in Pennsylvania in performing this inter-state service bore to the whole number of miles run by all the cars of the Illinois company everywhere. On this estimated amount of capital stock a tax was levied for a period of ten years, from 1870 to 1880, and judgment was rendered in the Court of Common Pleas, and affirmed in the Supreme Court of Pennsylvania, for the amount, exclusive of penalties and interest, of $21,109.63. The statutes of Pennsylvania under which the officers of the state assumed to act were, for the years 1870 to 1874, the fifth section of the Act of 1868; for the years 1875, 1876 and 1877, the fourth section of the Act of 1874; from 1878 to 1880, the Acts of 1877 and 1879. The following are the material parts of the statutes referred to:

ACT OF 1868, ENTITLED: "AN ACT TO REVISE, AMEND AND CONSOLIDATE THE SEVERAL LAWS TAXING CORPORATIONS, BROKERS AND BANKERS."

"SECTION 5. That *the capital stock* of all companies whatever, incorporated by or under any law of this commonwealth, or incorporated by any other State, and lawfully doing business in this commonwealth, or that may be hereafter incorporated, except banks and savings institutions and foreign insurance companies licensed in pursuance of the general acts in relation thereto, *shall be subject to and pay a tax* into the treasury of the commonwealth, annually, at the rate of one-half mill for each one per cent. of dividend made or declared by such

company, and in case of no dividend being made or declared by such company, then three mills upon a valuation of the capital stock of the same, made in accordance with the provisions of the second section of this act: *Provided*, That companies liable to tax on dividends in addition to tax on capital stock, prior to the act approved April twelfth, one thousand eight hundred and fifty-nine, entitled, 'An Act to equalize taxation upon corporations,' shall from the said date be exempt from any tax on dividends: *Provided further*, That building associations, plank road or turnpike companies, shall not be liable for any tax to the commonwealth when such companies make or declare no dividends."

ACT OF 1874, ENTITLED, "AN ACT FOR THE TAXATION OF CORPORATIONS."

"SECTION 4. That every railroad company, canal company, steamboat company, slack-water navigation company, *transportation* company, street passenger railway company, and *every other company* now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any other State, and doing business in this commonwealth, and owning, operating or leasing to or from another corporation or company any railroad, canal, slack-water navigation or street passenger railway, or device for the transportation of freight or passengers, or *in any way engaged in the transportation of freight or passengers*, shall be subject to and *pay a tax* into the treasury of the commonwealth, annually, at the rate of nine-tenths of one mill *upon its capital stock* for each one per cent. of dividend made or declared by such company, and in case of no dividend being declared or made by such company, upon either its common or preferred stock, then six mills upon a true valuation of the capital stock of the same, upon which no dividend has been made or declared, made in accordance with the provisions of the third section of this act."

ACT OF 1877, ENTITLED "AN ACT TO EQUALIZE THE TAXATION OF CORPORATIONS AND COMPANIES."

"SECTION 3. That every company or association whatever now or hereafter incorporated by or under any law of this commonwealth,

or now or hereafter incorporated by any other state or country, and doing business in this commonwealth, except building associations, banks, savings institutions and foreign insurance companies, *shall be subject to and pay* into the treasury of the commonwealth, annually, *a tax to be computed as follows*, namely: If the dividend or dividends made or declared by such company or association, during any year ending with the first Monday in November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-half mill *upon the capital stock* for each one per centum of dividend so made or declared; if no dividend be made or declared, or if the dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of three mills upon each dollar of a valuation of the said capital stock, made in accordance with the provisions of the first section of this act; and in case any such company or association shall have more than one kind of capital stock, as for instance, common and preferred stocks, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-half mill for each one per centum of dividend made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of three mills upon each dollar of a valuation, made also in accordance with the provisions of the first section of this act, of the capital stock upon which no dividend was made or declared or upon the par value of which the dividend or dividends made or declared did not amount to six per centum."

ACT OF JUNE 7TH, 1879.

"SEC. 4. Every company or association whatever, now or hereinafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any other state or territory of the United States, or foreign government, and doing business in this common-

wealth, or having capital employed in this commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner, except foreign insurance companies, banks and saving institutions, shall be subject to and pay into the treasury of the commonwealth, annually, *a tax* to be computed as follows, namely: If the dividend or dividends made or declared by such company or association as aforesaid, during any year ending with the first Monday of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-half mill *upon the capital stock* for each one per centum of dividend so made or declared; if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of three mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the second section of this act; and in case any such company or association shall have more than one kind of capital stock, as for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-half mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto tax shall be charged at the rate of three mills upon each dollar of a valuation, made also in accordance with the provisions of the second section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum; and it shall be the duty of the treasurer or other officer having charge of any company or association upon which a tax is imposed by this section of this act, to transmit the amount of said tax to the treasury of the commonwealth within fifteen days from the 31st day of December, in each and every year; *Provided*, That whenever such corporation or company shall make any profit and add the same

to its sinking fund, without a division thereof among its stockholders, the amount of the profit thus added to its sinking fund shall be included in the report required by the second section of this act to be made, and for the purpose of this act, the same shall be treated as having been divided amongst the stockholders, and shall subject the capital stock to taxation as a dividend; *Provided, however*, That said money or any part thereof shall be expressly set apart for the payment of debts."

Upon this record the Court of Common Pleas held as follows (Rec., p. 54):

On the facts, defendant claims that no part of its capital stock is invested in this State. The argument is that its cars are personal property, and, as they are not permanently located in this State, but pass into, through and out of it, this personal property has no taxable *situs* in Pennsylvania, and could not be taxed specifically in any given locality; and, therefore, it is contended, as the tax on capital stock is a tax on the property in which that capital is invested, the latter cannot be taxed.

It has certainly been settled by *Commonwealth* v. *Standard Oil Company*, 101 Pa. St., 145, that "a tax upon the capital stock of a "company is a tax upon its property and assets;" but it has never yet, so far as we know, been decided that the capital stock of a company and its property and assets are identical, or that any given part of the former represents any specific articles of the latter. It would be carrying the principle to a dangerous extreme so to decide.

We hold, therefore, that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by defendant in this State bears to the whole number of miles operated by it, without regard to the question when any particular car or cars were used.

On appeal the Supreme court affirmed the judgment in the following terms (Rec., p. 61):

Per CURIAM:

We think it very clear that the plaintiff in error is engaged in

carrying on such a business within this commonwealth as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company "is a tax on its property and assets," yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this State. They are daily passing from one end of the State to the other. They are used in performing the functions for which the corporation was created. The fact that they also are operated in other States cannot wholly exempt them from taxation here. It reduces the value of the property in this State justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule.

Judgment affirmed.

Upon this judgment we assign for error:

First. The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the State of Pennsylvania by reason of its running any of its cars into, out of, or through the State of Pennsylvania in the course of their employment in the inter-state transportation of railway passengers.

Second. The mileage run by such cars in Pennsylvania in the course of such employment furnishes no lawful basis for ascertaining what proportion, or holding that any proportion, of the capital stock of the Pullman Company had local investment or *situs* for taxation in Pennsylvania.

The cars which are the subject of the proposed taxation are the property of a proprietor having no personal domicil within the territory of Pennsylvania, and the property itself is never within that territory except for such time as it is in the course of its actual performance there of its inter-state service. Under

these conditions no jurisdiction can arise in that commonwealth for a tax upon the capital stock of the proprietor corporation. A tax upon the capital stock of the corporation is a tax upon its property and assets. *Commonwealth* v. *Standard Oil Company*, 101 Pa. St., 145; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 209.

Jurisdiction over the subject taxed is a fundamental condition of the power to tax; and without domicil of the owner or *situs* of the property, there is no jurisdiction of either.

To exercise the power of taxation the legitimate subject-matter of taxation—persons, property or business—must be found within the jurisdiction of the state.

State tax on Foreign-held bonds, 15 Wall. 319.

"Where there is jurisdiction neither as to person or property, the imposition of the tax would be *ultra vires* and void. * * * Jurisdiction is as necessary to valid legislative as to valid judicial action."

St. Louis v. *Ferry Company*, 11 Wall,, 423.

There is no jurisdiction as to person, for the plaintiff in error is a corporation not of Pennsylvania, but of Illinois, and its domicil is there; and there is no jurisdiction over its property, for it never enters the commonwealth of Pennsylvania except in the performance of its service of inter-state transportation, and it *can never by that use* qualify its original foreign *situs* nor acquire another within any jurisdiction, nor become absorbed into the mass of permanent property of any other state.

It is precisely at this point that issue is made. No domicil in Pennsylvania or personal jurisdiction over

the owner is pretended at all. It is a jurisdiction over property which is asserted; and we desire to mark a distinction at this point.

The distinction is this: We are drawn into no controversy with, nor even discussion of the doctrine which engages so large a part of the argument for defendant in error that the property of a non-resident proprietor *may* become so merged and incorporated into the general mass of property as to be taxable like any other property "*located* within the state," or that a state may tax its own corporations and their property as it will, as in the case of *The Delaware Railroad Tax*, 18 Wall., 206; or the rule so strenuously asserted, and illustrated by citation of the case of *The Telegraph Company* v. *Massachusetts*, 125 U. S., 530, that the Regulation of Commerce clause in the constitution does not prevent the taxing of "property *located* within the state as the "property of other citizens is taxed."

Accordingly when, as in the case of the *Pullman Company* v. *Twombley*, 29 Fed. Rep., 663, the court says: "We insist that an equal and uniform property tax is "not a regulation of commerce, although it reaches to "and affects property used in inter-state commerce," we stand in no opposition to that statement of law, if the qualification be added which is expressed in the case of the *Gloucester Ferry Co.* v. *Pennsylvania*, namely: "*provided* always the property be within the jurisdiction "of the state." This is simply the rule adjudged by this court in *Leloup* v. *Mobile* as to property "*located* "within the state." The question in the present cause is, (precisely as it was in the Gloucester Ferry case,) whether the subject taxed here *is* within the jurisdiction of the state? And our contention is over the

theory by which such jurisdiction is sought to be extended over it. The very question is whether, under the restraint of that clause of the constitution and the conditions of this case, such property entering a state only in the course of inter-state commerce ever does become commingled with and a part of the general mass of "property *located* within the state." The court, in the present case, has only the single fact to go upon, that actually the property is never in the state at all except in the course of its service in an inter-state transportation, and we contend that it *can never by that use* lose or acquire *situs* for a local taxation. The cars in question cannot *by that employment* become a part of the general mass of property within the jurisdiction for taxation of any state through which they have occasion to be run. That is the question.

The distinguishing feature of the present case is that special prominence is sought to be given to certain conditions, with the idea that they lend exceptional reinforcement to the present assertion of the power to tax. On the other hand, to our mind, the conditions to which such emphasis is given are neither new nor material. We have to do with the identical proposition, naked as a needle, that has so often been considered and passed upon by this court. The conditions to which this assumed importance is attributed are that the cars of the Pullman Company are run, though confessedly in an exclusively inter-state service, in such considerable numbers as to represent a large investment of capital, and not casually or occasionally, but in a regular and continuous service over settled and comparatively permanent lines of inter-state travel.

Inasmuch as any possible difference between the present

case and former ones must be found in these elements, some closer analysis ought to locate with greater precision the specific and exact element of difference. Two elements are involved in the language used, one is the quantity of the investment and the other the regularity or systematic performance of the service. Which of these constitutes the essential distinction? The logic here is as exact as if it were mathematical. In the language of the calculus, a function (of the difference) = the result. Now, what is the function of the difference in the present case, which equals a power to tax excluded in all other cases? It is hard to think that it can be the regularity of the service. A single car run with regularity from New York to Washington on every legal holiday, or at other stated intervals, and back, would hardly, because of its regularity, be taxable for the crossing of Pennsylvania. Cars running without regularity or system, but solely as the exigencies of travel and the opportunities to employ them might make it desirable to send them out, but in actual fact amounting to a very great number of cars extending their service over every part of the year, and running from New York to various points, Chicago, St. Louis, Cincinnati and New Orleans, Washington and Florida, would seem to meet more nearly the terms of the alleged condition upon which the present claim is based. We may perhaps assume, therefore, that the function of the difference above referred to is not the regularity of service, but the aggregate quantity of property always shifting, but present from time to time in a state over which the inter-state service is performed, which gives rise to the right of local taxation, if that right exists at all. For the proposition contended for by the

state is that the performance of an exclusively interstate service of transportation, which involves the transit of cars of a non-resident corporation across the territory of the state, creates when it reaches in magnitude some point, not defined, a local *situs* of some *proportionate part* of the cars making the transit; and that this *proportionate part*, however ascertained, may be treated for taxation as a permanent part of the general mass of property within the state.

It is necessary to say that this claim finds its origin in an opinion of the Circuit court of the United States for the Southern district of Iowa, in the case of *The Pullman Company* v. *Twombley*, 29 Fed. Rep., 658. In the several cases pending in this court in which this doctrine is asserted the opinion of the learned judge in that case is treated as the exponent of the proposition. We must recur to that opinion, therefore, for the expression of the principle with which we have to deal, and for convenience of reference we submit its material portions in the note below.* We yield no precedence in our respect for any reasoning or judgment announced by the eminent jurist who rendered this opinion. But as, being quoted at much length, it constitutes, in the briefs filed, the arguments of the defendants in error upon the subject, we submit with entire deference the considerations which we desire to have examined by the court.

* "It appears that the complainant is a foreign corporation, created under the laws of the State of Illinois, and domiciled in Cook county in that state. It is engaged in the business of manufacturing, using and hiring to be used, sleeping, drawing-room and parlor-cars. It has certain contracts with the various railroads running through the State of Iowa, by which it furnishes to them such cars under contracts providing for their use and operation. . . . These cars are all used

in inter-state commerce; that is, all of them run from points outside the State of Iowa into or into and through the State of Iowa, or from points in the State of Iowa to points outside the state.

"Complainant, therefore, insists that, being instrumentalities used exclusively for inter-state commerce, and the domicile of the owner being outside of the state, they are exempt from taxation by the state. . . . . The state aims to tax that property which it protects, and only to the extent that it furnishes protection. If it cannot do this, it requires but a moment's reflection to see that the state will be shorn of much of what every candid man must feel to be honest revenue. . . . . .

"Now, as stated, the claim of complainant is, that because this property is used in inter-state commerce it is exempt from taxation at any other place than the domicile of its owner. I deny the proposition, and affirm the law to be, that personal property, continuously used in a state, acquires a *situs* in that state for purposes of taxation, and may, at the option of the state, be subjected to an equal property tax, and that, notwithstanding it be used exclusively in inter-state commerce. The state is sovereign except as limited by the federal constitution. A sovereign may tax all property within its jurisdiction, and, unless there be found in the federal constitution some provision taking away this power, the State of Iowa may unquestionably tax this property used within its territorial limits. *Lane Co.* v. *Oregon*, 7 Wall., 77; *Ward* v. *Maryland*, 12 Wall., 427; *Railroad Co.* v. *Peniston*, 18 Wall., 5.

"The restriction on the power of the state is claimed alone by virtue of clause 3 of section 8 of article 1 of the Constitution of the United States, which grants to Congress the power 'to regulate commerce with foreign nations and among the several states.' I insist that an equal and uniform property tax is not a regulation of commerce, although it reaches to and affects property used in inter-state commerce. Such a tax is not similar to a license or occupation tax. They are conditions of, or restrictions upon, the doing of the business, while the former is simply a subjection of the property employed in the business to the common burden of state support. A citizen of Canada, with his only domicile there, may build in the city of Des Moines a sleeping-car. It remains idle and unused. The duty of the state to protect that

property for its owner is clear, and equally clear its correlative right to subject it to ordinary taxation. To provide protection costs money, and the tax is the owner's proper payment therefor. The car may be employed in commerce and run continuously from Davenport to Council Bluffs. The duty of protection and the right of taxation confessedly remain unchanged. Next year it extends its run across the Mississippi river to Rock Island. The duty of protection remains. Has the right of taxation gone? Must both Iowa and Illinois pay for furnishing this citizen of Canada protection to his property, and neither have a right to exact any compensation therefor? Does the regulation of inter-state commerce compel such an absurdity and wrong? If the imposition of an equal and uniform property tax upon the vehicles used in inter-state commerce be a regulation of commerce, the domicile of the owner and the *situs* of the property are immaterial questions. The use determines the exemption, and all such property is released from every burden of state taxation. If it be a regulation of commerce to impose such a tax in Iowa, where the property is found, it is equally so in Illinois where the owner is domiciled. Surely such a sweeping exemption was never within the contemplation of the framers of the federal constitution in granting the power to Congress to regulate inter-state commerce. . . .

Neither does the domicile of the owner furnish, in the present case, any basis of exemption. It is true that the domicile of the owner (the complainant) is in the State of Illinois, and that for many purposes the *situs* of personal property is the domicile of the owner. *Mobilia sequuntur personam.* But for purposes of taxation, tangible property has a *situs* wherever it is found. *Railroad Co.* v. *Pennsylvania*, 15 Wall., 300. Now, these cars—tangible property—are found, and found continuously in the State of Iowa. This is not the case of a car owned in another state making a single trip through the State of Iowa and then returned to the state where it belongs. Such temporary transit, it may be conceded, would not change the *situs* of the property. It is also true, according to the allegations of the bill, that the complainant, being the owner of a thousand or more sleeping cars in use throughout the United States frequently changes cars from one run to another so that identically the same cars may not be continuously in use in the State of Iowa. But this interchange does not

abridge the statement that there is a continuous and constant use in the State of Iowa of the sleeping-cars belonging to the complainant, and, being thus continuously and constantly used in that state, they acquire a *situs* there for the purposes of taxation. As to other tangible property, it goes without saying that its continued presence in a state gives it a local *situs* for purposes of taxation. It is doubtless within the legislative power, by suitable enactment, to establish a *situs* for personal property elsewhere than at the place where it is found, and this fact interprets several decisions of the Supreme court. . . . . .

My conclusion, therefore, is [1] that property is not exempted from liability to an equal and uniform property tax by the fact that it is used, either partially or exclusively, for inter-state commerce; [2] that vehicles of transportation, used constantly and continuously upon a single run, acquire a *situs*, for purposes of taxation, independent and irrespective of the domicile of the owner; [3] such *situs* is not destroyed by the fact that the owner, owning many vehicles of like character, and having lines in various parts of the United States, transfers from time to time such vehicles from one line to another, providing a constant and continuous use of such vehicles is preserved upon the single run; [4] where such vehicles are used upon a run extending through two states, there is a *situs* for taxation in each state to a fair proportion of the value of the property so used."

That a state may tax the railway cars of a foreign corporation which are never present within a state except in transit, or that such presence in a state can give rise to a local *situs* of such property for local taxation is opposed, in our view, to the whole body of decisions of the Federal courts.

Such right to tax receives no support from the cases cited, which hold that a state may tax its own corporations as it may see fit, and may tax the property of non-residents, which is located within the state, as it may tax the property of its own citizens, even though such property be employed in inter-state commerce. Such

a case is *Delaware Railroad Tax*, 18 Wall., 206, which illustrates the proposition that a state may tax its own corporations as it chooses, whatever their occupation may be. Perhaps the State of Pennsylvania, and its counties, may levy upon corporations of its own creation such contributions that they cannot possibly do business and pay the tribute; but the plaintiff in error is not a corporation of Pennsylvania.

Similar irrelevancy is true of cases which illustrate the proposition that a state may tax the property of non-residents which is actually located within the state. Illustration of such cases and of property so located may be found in the case of *The Telegraph Company* v. *Massachusetts*, 125 U. S., 530. There the Telegraph Company had erected its poles and extended its lines of wire and established its offices for business all over Massachusetts. It had a large investment in a plant as definitely located within the state as the road-bed of a railway or the farm of a citizen. In the present case there is no property correspondingly located within the state. We venture to believe that if, in order to transmit a communication from New York to Boston, the telegraph company had capacity to project a line for the delivery of that communication and withdraw it the moment the service was accomplished, there could be no tax upon the property that performed that service, no matter how often the service might be repeated. In the case of *The Standard Oil Company*, 101 Pa. St., 119, that company was taxed only upon its property in certain local partnerships doing business in Pennsylvania. The plaintiff in error has no such interests, nor any local plant in Pennsylvania such as the telegraph company had in Massachusetts. It

owns no railways on which it runs; its cars run over the tracks of railways owned and operated by other corporations. They are always in motion. In the inter-state service shown in this record they fly across the state like carrier pigeons. They have no abiding place but the domicil of the company in Illinois. When they cease to be active it is thither they return. They never *enter* another state *with a purpose to remain*, nor for the *purpose* of business *within it*.

It is said: "No case can be found in which the Su- "preme Court has declared a mere property tax void "*on the ground that the property on which it was imposed* "*was employed in inter-state commerce.*" But it is to be borne in mind that that is not the proposition at present in issue. The proposition is *not* that all property employed in inter-state commerce is exempt from taxation, but that the property of a proprietor domiciled in one state cannot acquire a *situs* in another state, giving jurisdiction for taxation there, merely by use there in exclusively inter-state commerce. It is not that the use in inter-state commerce exempts property over which jurisdiction otherwise would exist, for taxation, but that where no jurisdiction otherwise exists its use within a state exclusively for inter-state commerce cannot of itself originate such jurisdiction. It is also said:

"This is not the case of a car owned in another state making a "single trip through the state of Iowa, and then returned to the state "where it belongs. Such temporary transit, it may be conceded, "would not change the *situs* of the property. It is also true, accord- "ing to the allegations of the bill, that the complainant, being the "owner of a thousand or more sleeping-cars in use throughout the "United States, frequently changes cars from one run to another, so "that identically the same cars may not be continuously in use in the

" state of Iowa. But this interchange does not abridge the statement " that there is a continuous and constant use in the state of Iowa of " the sleeping-cars belonging to the complainant, and, *being thus* " *continuously and constantly used in that state, they acquire a situs* " *there for the purposes of taxation.*"

Now this last clause is but a *statement of the proposition* under discussion.

The decisions of this court, and of nearly every other, are that such property so used does not become a part of the mass of property within the territory of any state, and acquires by such use no *situs* which can give rise to any jurisdiction for local taxation.

In *B. & O. R. R. Co.* v. *Allen*, 22 Fed. Rep., 376, in the Circuit court of the United States, W. D. Virginia, it was held that the Baltimore and Ohio road, being a foreign corporation, its rolling stock used in operating leased roads in the State of Virginia, was not liable to taxation.

In the case of the *Standard Oil Company*, taxes were claimed by Pennsylvania by reason of the ownership of shares of stock in certain Pennsylvania corporations, and of merchandise in the state brought there for sale, and of *interests in certain local partnerships doing business in the state.* This last item clearly represented a local investment of capital, and a doing of business in the state like any other resident merchant. But the court held that apart from that the state had no jurisdiction to further tax the capital stock, *i. e.* the property of the Standard Oil Company, for " it was a fundamental prin- " ciple that, in order to be taxed, the person must have " a domicil in the state, and the thing must have a *situs* " therein; that persons and property *in transitu* could " not be taxed." That judgment was cited by this court

as an authority for its opinion in the *Gloucester Ferry* case; and how the same court that gave the opinion in the *Standard Oil Company* case could have held as it did in the *Gloucester Ferry* case or in this present case, we are at a loss to understand.

The adjudications of this court upon the exact point in issue, are many, uniform and explicit. In *Hays* v. *The Pacific Mail Steamship Company*, 17 How., 597, it was held that an ocean steamer, owned and registered in New York, and *plying regularly* between Panama, San Francisco and ports in Oregon, was not subject to taxation by the State of California. The tax was assessed by the State of California, upon a line of twelve steamships plying along this line, having agencies at various places, and among others at San Francisco, and a naval dock and ship-yard in that state for furnishing and repairing their steamers. Their business was the transportation of passengers and merchandise between New York and San Francisco by way of Panama, and between San Francisco and ports in Oregon. It would be idle to quote at length this familiar case. It was held that if the State of California could impose a tax, any other state, into whose ports the vessels might enter, might do the same; that though there might be more delay and the vessel might lie longer at one port than another, that would be a "matter accidental, which in "no respect could affect the question as to the *situs* of "the property, in view of the right of taxation by the "state." In running to the ports of different states, such a vessel is "within the jurisdiction of all or any "of them temporarily, and *for a purpose wholly exclud-* "*ing the idea of permanently abiding* in the state."

The court further said:

"We are satisfied that the state of California *had no jurisdiction* over these vessels *for the purpose of taxation;* they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state."

CAMPBELL, J., said:

"The material fact is that the vessels were *in transitu*, having no *situs* in California, nor permanent connections with its internal commerce."

In *Morgan* v. *Parham*, 16 Wall., 471, the adjudication was to the same effect, namely, that a vessel belonging in New York was exempt from taxation in Alabama, not necessarily because of her employment in inter-state commerce, but because *that employment precluded her acquiring* a *situs* for taxation at any point to which her employment might lead her, and *precluded her becoming blended* with the mass of property of any such locality. The court, though the vessel was physically within the limits of the city of Mobile, likened its status there to that of "a traveler on that day passing through "that city in his private carriage, or an emigrant with "his worldly goods on a wagon", and said:

"It is the opinion of the court that the State of Alabama had *no jurisdiction* over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States with its *situs* at the home port of New York where it belonged, and where its owner was liable to be taxed for its value."

The Supreme court of New Jersey has passed directly upon this subject. A statute of that state declared that if a railroad of New Jersey was under lease to a foreign corporation, any tangible personal property of such foreign company, if used or kept but a part of the time

in the state, should be assessed such part of its value as should be proportionate to the period of time, out of the whole year, which it was kept in the state. Certain engines and cars of the foreign company used on its leased line in New Jersey in the course of inter-state commerce were assessed, and in *Central R. R. Co.* v. *State Board of Assessors*, 49 N. J. Law, 1, it was held that the tax upon such property employed in inter-state commerce was illegal. The Supreme court, by BEASLEY, C. J., said:

"The Philadelphia and Reading Company is taxed in this manner because it is a foreign corporation, operating a railroad in this state as a lessee. This corporation was incorporated under the laws of Pennsylvania, and has its principal office and place of business in the city of Philadelphia. The property taxed is held by it either as general or special owner. It is taxed on the basis of being used part of the time, on the roads leased by the company in this state, and the tax is graduated by the length, in point of time, of such use. *It appears from the proofs that such use consists almost entirely in the transportation of passengers and merchandise across the territory of this state in the course of inter-state commerce.* The road is made up, in part, of leased roads in other states and in this state, and the equipments taxed are devoted to this business over the entire line. The company carries passengers and goods occasionally from place to place in this state by means of these trains, and as an incident merely to its business of assisting in the commerce between the states.

"The question, therefore, arises: What jurisdiction has this state, for the purposes of taxation, over this property?

"It is obvious that these things have no *situs* in this state; they are merely here *in transitu*. The circumstance that they pass over a road in this state leased by the owner of them cannot so annex them to the road as to make them taxable as a part of it. The owner of the property has a foreign domicile, which is the permanent *situs* of the property, it being brought into this jurisdiction solely in consequence of the general business followed by the corporation and which has been already characterized. * * *

"We look upon that property, and which is owned by a non-resident, as being here in this state solely because it is an instrumentality of inter-state commerce, and we think, under such conditions, that it cannot be, to any degree, directly taxed by this state."

The foregoing case cites with approval the case of the *Pullman Southern Car Company* v. *Nolan*, 22 Fed. Rep., 276. In that case Mr. Justice MATTHEWS, holding unconstitutional a statute of the State of Tennessee said:

"In the present case the Pullman Southern Car Company, a corporation of Kentucky, has no domicile in Tennessee, and is not personally subject to its jurisdiction for purposes of taxation, and the sleeping cars *which it runs and uses upon the railroads of that state, in the transportation of passengers into and from it, from and to other states*, have no *situs* within that state *for the purposes of taxation. They are not brought into the state for the purpose* of being employed *in a business carried on within it*, and *do not become a part of the mass of property* within the *jurisdiction of the state for purposes of taxation.* They are in the state only as passing to and from it while in the act of transportation, performed by virtue of a right secured to the owners of them; not by the authority of the laws of Tennessee, but by virtue of a right secured by the exclusive jurisdiction of Congress under the constitution."

The spear of Ithuriel never touched keener or truer than do these words which were also substantially used in *Hays* v. *The Pac. Mail &c. Co.* Such use of cars creates no local *situs*, for "they are *not brought into* "the state for the *purpose* of being *employed in a business* "*carried on within it.*" Therefore, they *do not become a part of the mass of property* within the jurisdiction of the state for the purpose of taxation.

In *P. W. & B. R. R. Co.* v. *Appeal Tax Court of Balt.*, 50 Md., 416, the Supreme court of Maryland said:

"The engines and cars of the appellant *have no abiding place* on

permanent location in this state, *so as to become incorporated with the other permanent property of the state*, and are only brought here transiently, while employed in the operations of the road."

It was thereupon held that this rolling stock was not taxable in Maryland. And in the same court, in *Appeal Tax Court of Balt.* v. *Pullman Palace Car Company*, 50 Md., 452, where the precise question pending here was at issue, the court held that the cars of the Pullman company were not taxable, and said that the question had been definitely settled by its decision above quoted from in the case of the *Phila., Wilm. & Balt., R. R. Co.*

In *Pickard* v. *The Pullman Southern Car Company*, 117 U. S., 34, the relation of the Pullman cars to the state of Tennessee was identical with that in the present case to the State of Pennsylvania. The Pullman cars ran through, into and out of the State of Tennessee in an employment precisely such as is shown in this record. The opinion of Mr. Justice BLATCHFORD in that case is characterized by Mr. Justice MILLER in *Fargo* v. *Michigan* as "an exhaustive review of the previous decisions in" this class of cases;" and in that opinion the court said:

"As such vehicle of transit the car, so far as it was engaged in interstate commerce, was not taxable by the State of Tennessee; because the plaintiff had no domicil in Tennessee, and was not subject to its jurisdiction for purposes of taxation; and the cars had no *situs* within the State for purposes of taxation; and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege. (P. 46.) In the case at bar the plaintiff was not a Tennessee corporation, and had no domicil in Tennessee, and the sleeping cars in question, as before said, had not any *situs* in Tennessee for the purposes of taxation." (P. 50.)

The case of *The Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S., 196, leaves nothing to be added to the line of authority which seems to put an end to the doctrine now again urged upon this court. It would be idle to re-state the familiar details of that well-known case; and no more comprehensive or conclusive argument can be supplied in this case than the opinion handed down in that one. The boats of the Ferry Company, plying continuously in an inter-state service between the shores of New Jersey and of Pennsylvania, having their home in New Jersey but spending half their time and performing half their service in Pennsylvania, were nevertheless (1) not doing business within that state, (2) became never commingled with the general mass of property there, (3) nor by their presence or employment acquired any local *situs* there for taxation.

The cases of *Hays* v. *The Pacific Mail Steamship Company*, 17 How., 596; *Morgan* v. *Parham*, 16 Wall., 471; *St. Louis* v. *The Ferry Company*, 11 Wall., 423; *Pickard* v. *The Pullman Company*, 117 U. S., 34 (where the service and the conditions were identical with the present ones), and *The Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S., 196, do each and all of them embrace every element upon which argument in support of the claim of defendant in error is based. In each and all of them were the elements suggested for special consideration in this case.

Nothing can be more regular than the service of a ferry company; no lines more settled and permanent than those along which it operates. If there be but one boat, it is half the time in the foreign state. If there be two, though the individual boats are changing, there will always be the equivalent of one boat there; if the

number be multiplied indefinitely, one-half of the investment will be permanently in the foreign state, and will perform there under the shelter and protection of its laws one-half of the business of the company. Every element, which is conceived to differ the present case from those above cited is involved in them and received in them the exhaustive examination of this court. The regularity of the service; the permanence of the lines of operation; the magnitude of the investment measured by the quantity of the property employed; the shifting and change of individual vehicles, but the continuity of the presence within the state of property employed in the service; the continuous performance physically within the state of a regular part of the business in which the vehicles are employed; and their protection by the state while within its territory, all these were present in each of those cases. The well considered, uniform and emphatic adjudications of this court, and of the highest courts of the several states, have been that foreign property so employed, does never by that use alone blend with the mass of local property, nor acquire any new *situs*, nor become engaged in "business within the state" in any sense that gives a power of local taxation.

Thus far we have stated the basis of authority by which this construction of the constitution is established; but the correctness of these constructions itself is questioned. It is said: "Surely such a sweeping exemption was "never within the contemplation of the framers of the "federal constitution in granting the power to congress "to regulate inter-state commerce." In the case of *The Pullman Company* v. *Hayward, Treasurer, etc.*, number 319 of this calendar, and ordered by the court to be

heard in connection with the present case, the Attorney General of the State of Kansas, on page 39 of his brief, quotes Mr. Hamilton in The Federalist, number 32, in support of his proposition, and continues as follows:

"This commerce clause of the constitution, so often "invoked upon questions relating to inter-state com- "merce, was not intended by the framers of the consti- "tution, if we may judge from the most authoritative "contemporaneous expositions of the constitution at "the time of its adoption, to trench upon the powers of "the states in raising their own revenues by taxation of "property *used* within their own limits."

The right of the state as an independent sovereign power to tax is asserted in the present case to an extent far beyond the limits allowed by the above adjudications.

We need not discuss the prerogative of each of the separate states, and whether they are the same as those of absolutely independent nations. As such, each one would have exclusive powers of sovereignty and jurisdiction throughout its territory, and its taxation might reach all property, whatever the circumstances might be under which it had come within its borders. Any consideration accorded to foreign laws, and any qualification in actual conduct of this primary prerogative would depend at all times absolutely on the consent, express or implied, of the state itself. But in practical affairs, every government does put bounds to the exercise of this absolute prerogative. Every state does accord an operation, more or less extended, to foreign laws and to rights existing under those laws to property within its own territory. Every nation has found its advantage in this course, and bases it upon considerations of utility and mutual con-

venience resulting in the benefit of its own citizens. Accordingly, that which is known as comity, the comity of states, has gradually formulated itself into a system of rules and precedents, and all states consent to limit the exercise of their primary power and absolute right by what is no longer the caprice, but a rule, of comity. Doubtless up to a certain line this is the only limitation to which states in the Federal Union are subject. Ordinarily the rule that as to *situs* personal property follows the domicil of its owner is merely a voluntary concession of the state that adopts the rule. It is a rule of comity rather than an absolute principle (*Green* v. *Van Buskirk*, 5 Wall., 312), and what is so strongly insisted upon by counsel is true that the state has power to separate for purposes of taxation the *situs* of personal property over which it has jurisdiction, from the owner's domicil. That is a primary rule, and it is based upon the sovereignty of the states and the idea that they are foreign to each other. All this is true until we come to the line of constitutional interference.

But with the power of the states in that foreign relation to each other we have nothing to do. Wherever they come within the obligation and effect of the provisions of the federal constitution they are no longer foreign to each other. The states are foreign to each other it is held, *for all but federal purposes*. For federal purposes they are not foreign, nor sovereign, nor independent, and every purpose is a federal purpose for the sake of which the arch of federal supremacy is thrown over them. Such a purpose is the regulation of commerce. That whole subject is brought within the supremacy of the federal government. As to that the states are not foreign to each other, and no argument

has any force which is founded upon the idea of their independent sovereignty or upon analogies between foreign states. Within the entire range of obligation of the constitution we are one people, like the people of a single state; and such is the emphatic declaration of this court in the statement of Mr. Justice BRADLEY in *Robbins* v. *The Taxing District*, 120 U. S., 494, where he says: "In a word, it may be said, that *in the matter of inter-*" *state commerce*, the United States are *but one coun-*" *try*, and are and must be subject to one system of reg-" ulations, and not to a multitude of systems." The result is that while it is not to be doubted that taxation is a correlative of protection, and that taxes are the price of the protection afforded, there is nevertheless no power in the states to tax for *protection extended over this commerce.* That power is taken away; the states are bound to protect it without such compensation; but there is no solecism involved in this exemption. Their compensation is found in the reciprocity that is established, the mutual obligation that binds all the states as between themselves. Property entering into a state for the federal purposes of inter-state commerce, and for that only, *cannot be taxed for its lawful protection in that use.*

Whether the case of a foreign nation is identical, and whether the illustration drawn from a supposed case with Canada is pertinent, are questions it is not necessary to consider until the case arises. There can be no doubt of the supremacy of Congress, however, over all that subject also, nor that in relation to commerce the states, as between themselves, are not foreign to each other.

In view of this, it is very plain that cases in which the

Supreme court of Illinois may have recognized the right of the several counties of that state to tax the cars of the Pullman Company, though their domicil is in but one county, can have no application. The State of Illinois may tax its own corporations as it will. If it chooses it may place upon them such burdens of taxation, and permit its counties to do the same, that they cannot possibly do business and pay the tribute. But the counties of Illinois cannot tax without the consent of the state, nor are the several states, so far as federal purposes and constitutional limitations subordinate them, any more foreign to each other than counties. Therefore, as against this constitutional clause which exempts all inter-state commerce from burden, they cannot impose a burden by taxation without having the consent of Congress, as the counties of Illinois have the authority of the state. When they have obtained this consent of Congress, and the right is then contested, this argument, by analogy, will have application and weight but not until then.

The counsel for the Commonwealth of Pennsylvania says:

"This case does not present a case of taxation of property *in transitu*, nor does it present any question as to the *situs* of rolling-stock of railways, as such questions are ordinarily presented. The property represented by the capital stock taxed is not moved for the purpose of consummating a single transaction, nor transported for the mere purpose of changing its place from one situation to another, but is continuously and permanently employed in going to and fro upon certain routes of travel as the means of carrying on an established and permanent business. The *lines* of Pullman's Palace Car Company are as *permanent*, in *legal contemplation*, having regard to the kind of business in which they are engaged, as the lines of railroad upon which

they run. They are as permanent as pipe lines for the transportation of oil, or as telegraph lines for the transportation of messages." *

If, out of such a distinctively inter-state service of cars that are always in motion, never entering the state for the purpose of abiding there, not the cars nor any of them, but an imaginary quantity representing a proportionate part of the investment in them is taxable in any state through which they run, then that quantity must be so taxable because the component parts of it are. These component parts are the several imaginary contributions of each of the separate cars. The whole conception is metaphysical, both the taxable aggregate and its factors. The aggregate time in the state of each moving car is a factor in the aggregate time of the moving mass of a hundred cars, and any taxable quality of the aggregate must be derived from that quality in each of its factors. If a hundred cars represent a *situs* for taxation of the equivalent of ten, then ten make up such a *situs* for one car and one for one-tenth of its value. But it is conceded that in "the case of a car owned in another State *making* "*a single trip* through the State of Iowa and then re- "turned to the State where it belongs, such temporary "transit would not change the *situs* of the property." How then, can two or three hundred cars make up a sensible quantity to which each car contributes nothing? How can two or three hundred nothings make up by addition a sensible quantity that shall be taxable? The dialectics of creeds and philosophies are barren of greater mysteries than these.

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* This citation is from his brief filed on the former argument of this cause at the last term, page 10. We have, of course, no other.

But now, if from the point which counsel has thus reached, we turn to retrace his processes, we shall never come to the point from which he started. Setting out with a sensible quantity and going by clearer light, that quantity can hardly disappear by the way without our perception of the point of its disappearance, and we shall conclude that if this spectral aggregate derived from our two hundred cars be really a part of the local mass of property, it is because it is made up of contributions having the same character, from each of the two hundred cars. It follows that a proportion of the value of each passing car has permanent location in Pennsylvania and gives a proportionate basis for taxation of capital stock. But this is precisely what this Court has expressly denied in the *Pickard* case, and in the *Gloucester Ferry* case; which proves that in going out we had some *ignis fatuus* for a guide, and that in the confused light of it we ran into a blind switch which has wrecked us in this limbo of inconsistency and confusion.

But let us see further to what this proposition would lead, if, for the sake of the argument, it be conceded. If the doctrine be established, it makes an end of any exclusive jurisdiction of Congress under the commerce clause, and, practically, of any domain of control by Congress at all. By the *hypothesis* this taxable quantity which comes into existence through the operation and presence in the state of an indefinite number of cars in inter-state service, but which is itself, when created, not a part of the cars themselves nor of any of them, is nevertheless *something which is* a part of the permanent mass of property in the state, and has a local *situs* there for tax-

ation. As such, by the hypothesis, it may be taxed as the state taxes other property definitely located in the state, and *as it taxes the property of its own citizens.* Being thus a part of the general mass of property located in the state, it is delivered altogether from the effect of the constitution, and is subject solely to the local law like other property having permanent *situs* there.

Plainly the power asserted here is not a mere right of the state to meddle till Congress acts. What is asserted is the primary power of a sovereign state over the subject-matter. It is a power as independent of the constitutional provision we invoke, and as superior to it as the power of the state to tax any of its citizens or the land within its territory. It is on this footing that the right to tax capital stock is said to be established.

If that be done, then the subject is withdrawn entirely from federal interference and from the jurisdiction of federal courts. The action of the state in taxing the property over which it has jurisdiction gives no ground for federal intervention. The jurisdiction of the state and its right to tax being established, the power of the state is beyond any control.

In *Weston* v. *Charleston*, 2 Pet., 466, Chief Justice MARSHALL said:

"If the *right to impose* the tax exists, it is a right which, in its nature, *acknowledges no limits.* It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe."

In the *Delaware Railroad Tax*, 18 Wallace, 231, the court said:

"The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corpora-

tion, or its separate corporate property. And the *manner in which its value shall be assessed*, and the *rate of taxation, however arbitrary or capricious*, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment, or right of taxation might be adopted than the one prescribed by the legislature of the state; *our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.*"

In *State Tax on Foreign-held Bonds* 15 Wall., 300, this court said:

"Unless restrained by provisions of the federal constitution *the power of the state, as to the mode, form and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction.*"

This language is cited and re-affirmed in *Kirtland* v. *Hotchkiss*, 100 U. S., 497. The power asserted by the state, therefore, if it exists, is, by reason of the ground on which it stands, beyond the domain of the jurisdiction of this court, and beyond control. But the tax upon capital stock of a corporation is a tax upon its property and assets. By the argument, therefore, the mere presence of these cars in the state while in transit and performing an inter-state service, gives rise to a power in every state through which they pass to tax the property and assets of the foreign corporation which owns them, and employs them in that service. A car running from New York through Pennsylvania to New Orleans, runs through ten states; a car running from New York through Pennsylvania to Florida, runs through nine states, in a continuous but single service. Every one of these states may tax the property and assets of a foreign owner arbitrarily, and even capriciously. Now, this power to tax has been declared by this court in *McCulloch* v.

Maryland, 4 Wheat., 316, and in *Crandall* v. *Nevada*, 6 Wall., 35, with great vigor of illustration, and in many other cases, to be the equivalent *of a power to destroy*. If a state may tax at all the property and assets of a foreign corporation engaged in such business, it may tax them to such an extent as to make the conduct of that business impossible. The bald result is that employment of railway cars in transportation admitted to be distinctively and exclusively inter-state, gives rise to a power of local taxation by which the inter-state business may be burdened, over-burdened and prohibited. Such a power is said in *McCulloch* v. *Maryland*, to be *repugnant to the supremacy* of the constitution. This result in itself is the *reductio ad absurdum* of logic which disproves the proposition upon which it is based. It is false in its premises and false in the steps of its logic, for no amount, not an *infinite* addition of nothings, can make a sensible quantity; and if it did the power of state taxation originated would evade and defeat the provision of the constitution, and is therefore inhibited by it. "Questions of power" said MARSHALL, C. J., in *Brown* v. *Maryland*, 12 Wheat., 439, "do not depend on the degree to which it may be exercised."

A tax imposed by a state upon the capital stock, in other words upon the property and assets, of a foreign corporation engaged there in inter-state transportation is, in effect, a condition imposed upon its right to do that business within or across that state. As a rule, perhaps, states may prescribe the conditions upon which foreign corporations may do business within their limits, but in *Phila. Fire Association* v. *New York*, 119 U. S., 110, the court carefully excluded any implication that that power could extend "to an interference with the trans-

"action of commerce between that state and other "states by a corporation created by one of such other "states." *Robbins* v. *Shelby Taxing District*, 120 U. S., 489. A transportation company, or a corporation engaged in the business of inter-state transportation cannot be subjected by any state to conditions upon its right to carry on such inter-state intercourse within its limits. *Fargo* v. *Michigan*, 121 U. S., 230. A tax on capital stock, and so upon the property and assets of a corporation, is in effect the same as a license tax, or a tax on the privilege of doing the business. The test of the validity of a tax, under the constitution, is the subject on which its burden falls and its ultimate effect. It is in effect a tax on the operation of inter-state commerce, for compliance with it is a condition upon which alone the business may be done by vehicles *entering the state for no other purpose.* The basis of the tax is removed from federal cognizance. It is declared to be identical with the right of the state to tax land or other property located within its borders. The question of the *extent* of such taxation is beyond the scope of federal interference. The condition must then be complied with, or the state may, if at all, tax so heavily as to make the crossing of its territory too costly. Without declaring the crossing illegal, it may still so burden the business that no one can pay the tribute. Perhaps it would not, but this court, by MARSHALL, C. J., in *McCulloch* v. *Maryland*, declared that the discretion on such a subject had not been reposed in any state.

A state cannot evade the inhibition of taxation by any declaration of its own as to the real character of the contribution it levies. In the *Pickard* case, a tax was declared to be a privilege tax, but was imposed directly

upon the cars. It was held that, "as these cars were "not property located within the state, it was a tax for "the privilege." It could not be a tax on the property, for there was no jurisdiction for that; it was, therefore, a tax or tribute laid upon that specific inter-state business. A state cannot establish a power to affect commerce by its declaration that a given article is not an article of commerce. *Bowman* v. *Railroad Co.*, 125 U. S., 465. It is equally powerless, and by a parity of reason, to fasten taxation on property used only in inter-state transportation by a declaration that a *situs* for taxation exists, or that a given amount of such use will be equivalent to a permanent commingling with the general property of the state of the property so used exclusively. If such a declaration of the state is futile, it is because the result aimed at is unlawful under the constitution. It is the nature of the use, not the amount of it, which excludes the power of the state.

It was a delusion of the commercial states in the time of the Confederation, that individual states might profit in a condition of things that permitted one to levy contributions on its allied neighbors. The delusion cured itself, and was intelligently abandoned under the constitution. But these revivals of the old Hellenic appetite that in about sixty years have drawn more than a hundred adjudications from this court show that it is not extinguished nor slaked, but only chained down by the bonds of the federal Constitution.

EDWARD S. ISHAM,
Of Counsel for Pullman's Palace Car Co.

EDWARD S. ISHAM,
JOHN S. RUNNELLS,
Of Counsel.

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IN THE SUPREME CO

OF THE UNITED STATES

PULLMAN'S PALACE CAR COMPANY, *Appellant,*
vs.
H. H. HAYWARD, TREASURER OF THE COUNTY OF ALLEN, ET AL., *Appellees.*

BRIEF FOR THE COUNTY TREASURE
THE STATE OF KANSAS, APPELL

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Attorney General of K
For Defendant County T

W. W. SCOTT, EMPORIA, KANSAS,
AND
S. B. BRADFORD,
Ex-Attorney General of Kansas,
Of Counsel.

IN THE SUPREME COURT

OF THE UNITED STATES.

PULLMAN'S PALACE CAR COMPANY, *Appellant*,
vs.
H. H. HAYWARD, TREASURER OF THE COUNTY OF ALLEN, ET AL., *Appellees.*

BRIEF FOR THE COUNTY TREASURERS OF THE STATE OF KANSAS, APPELLEES.

ON the 13th day of November, A. D. 1886, the appellant company filed in the United States Circuit Court for the District of Kansas, its bill of complaint in equity in words and figures following:

UNITED STATES OF AMERICA.—IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

To the Judges of the Circuit Court of the United States in and for the District of Kansas: Pullman's Palace Car Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, residing and doing business in the county of Cook, in the State of Illinois, brings this its bill of complaint against H. H. Hayward, treasurer of the county of Allen; J. M. Herriman, treasurer of the county of Anderson; T. J. Emlen, treasurer of the county

of Atchison; L. F. Wever, treasurer of the county of Barton; John J. Stewart, treasurer of the county of Bourbon; Thos. McLaughlin, treasurer of the county of Brown; John H. Austin, treasurer of the county of Butler; Wm. P. Martin, treasurer of the county of Chase; E. C. Scammon, treasurer of the county of Cherokee; J. B. Nipp, treasurer of the county of Cowley; S. R. Tuttle, treasurer of the county of Crawford; C. B. Stebbins, treasurer of the county of Davis; John J. Cooper, treasurer of the county of Dickinson; H. L. Moore, treasurer of the county of Douglas; W. L. Hobbs, treasurer of the county of Edwards; C. W. Rambo, treasurer of the county of Elk; Geo. Phillips, treasurer of the county of Ellis; A. Schmidt, treasurer of the county of Ellsworth; R. M. Wright, treasurer of the county of Ford; J. N. Harrison, treasurer of the county of Franklin; D. R. Menke, treasurer of the county of Finney; W. H. Drew, treasurer of the county of Greenwood; Frank Bentley, treasurer of the county of Hamilton; O. F. Casteen, treasurer of the county of Harper; Edward L. Parris, treasurer of the county of Harvey; J. H. Johnson, treasurer of the county of Jefferson; Solon R. Rogers, treasurer of the county of Johnson; Chas. W. Littleton, treasurer of the county of Labette: J. W. Spratley, treasurer of the county of Leavenworth; A. W. Burton, treasurer of the county of Linn; C. T. Cavaness, treasurer of the county of Lyon; R. O. Nelson, treasurer of the county of Marion; Chas. A. Chaplin, treasurer of the county of McPherson; J. H. Phillips, treasurer of the county of Miami; M. F. Wood, treasurer of the county of Montgomery; H. Lodge, treasurer of the county of Neosho; Edward Spaulding, treasurer of the county of Osage; W. H. Brown, treasurer of the county of Pawnee; H. P. Smith, treasurer of the county of Pottawatomie; A. W. McCandless, treasurer of the county of Reno; C. W. Shumway, treasurer of the county of Rice; Jas. M. Fortner, treasurer of the county of Riley; C. M. Harshbarger, treasurer of the county of Russell; Clarence Wilson, treasurer of the county of Saline; Geo. W. Walter, treasurer of the county of Sedgwick; Byron

Roberts, treasurer of the county of Shawnee; R. A. Anderson, treasurer of the county of Sumner; Chas. H. Gibbs, treasurer of the county of Trego, and *ex officio* tax collector for the counties of Gove, St. John, and Wallace; M. F. Stewart, treasurer of the county of Woodson, and Benjamin Schnierle, treasurer of the county of Wyandotte, all of which counties are municipal corporations in the State of Kansas, and all of which defendants are residents and citizens of the State of Kansas, and against the Atchison, Topeka and Santa Fé Railroad Co., the Kansas City, Topeka and Western Railroad Co., the Marion and McPherson Railroad Co., the Southern Kansas Railroad Co., the Wichita and Southwestern Railroad Co., the St. Louis, Fort Scott and Wichita Railroad Co., the Kansas City, Fort Scott and Gulf Railroad Co., the Missouri, Kansas and Texas Railroad Co., and the Fort Scott, Southeastern and Memphis Railroad Co., all of which railroad and railway companies are corporations organized and existing under and by virtue of the laws of the State of Kansas, and are residents and citizens of the State of Kansas, and against the Missouri Pacific Railway Co., a corporation organized and existing under and by virtue of the laws of the State of Missouri, and a resident and citizen of the State of Missouri, and against the Union Pacific Railroad Co., a corporation organized and existing under and by virtue of the laws of the United States of America, and a resident and citizen of the State of Nebraska.

And thereupon your orator complains and says:

That your orator's domicile, place of business, and principal office is in the county of Cook, in the State of Illinois, where it is engaged in manufacturing, constructing, equipping, supplying, owning, using, hiring to be used, and selling railway cars, such as sleeping cars, parlor cars, and drawing-room cars, and in manufacturing, constructing, equipping, and selling all other kinds of railway cars, and in doing other kinds of manufacturing business.

That your orator has no domicile, place of business, or principal office within either of the counties named or within

the State of Kansas, and is not subject to their several jurisdictions for the purposes of taxation.

That your orator had no real or personal property subject to taxation within either of the counties named, or within the State of Kansas prior to or during the year A. D. 1886, and has none at the present time.

That prior to January 1st, A. D. 1886, and continuously thereafter to the present time, certain railroad and railway companies owning and operating long, continuous, through lines of connecting railroads extending interstate and between foreign nations, through or from other States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico and the State of Kansas.

That for the convenience, accommodation and comfort of such railroad passengers so transported interstate and between foreign nations by such railroad companies, and especially when such transportation was for long distances, necessitating travel by day and by night-time, it became, and was and is necessary that there should be provided and used by such railroad companies upon such long, continuous, through lines of connecting railroads extending interstate and between foreign nations, through or from States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico, into, into and through, or into, through and out of the State of Kansas, sleeping cars, drawing-room cars, and parlor cars.

That prior to January 1st, A. D. 1886, each of such railroad companies entered into separate contracts with your orator, whereby your orator hired to each of such railroad companies such number of sleeping cars, drawing-room cars, and parlor cars, owned by your orator, as was then or should at any time thereafter become necessary for use by each of such railroad companies in operating its part of such long, continuous, through lines of connecting railroads extending interstate and between foreign nations, through or from other States or Territories of the United States of America, the

Dominion of Canada, and the Republic of Mexico, into, into and through, or into, through and out of the State of Kansas, and in transporting railroad passengers interstate and between foreign nations, each of which contracts, or a continuation or renewal thereof, still remains in full force and effect.

That by the terms and conditions of each of such contracts, your orator agreed to furnish to each of such railroad companies such number of sleeping cars, drawing-room cars, and parlor cars owned by your orator, as were then or should at any time thereafter become necessary for use by each of such railroad companies in operating its part of such long, continuous, through lines of connecting railroads, extending interstate and between foreign nations, through or from other States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico, into, into and through, or into, through and out of the State of Kansas, and in transporting railroad passengers interstate and between foreign nations.

That by the further terms and conditions of each of such contracts, your orator reserved the right to manage and control the inside of such sleeping cars, drawing-room cars, and parlor cars, and to furnish to railroad passengers the use or accommodation of seats or sleeping berths in such cars, receiving fixed prices therefor.

That by the further terms and conditions of each of such contracts your orator agreed to keep the carpets, upholstery, bedding, and all of the inside arrangements of such sleeping cars, drawing-room cars, and parlor cars, in good repair and condition, except as to repairs or renewals made necessary by accident or casualty; to also furnish one or more employés to attend each of such cars, whose duties should be to collect from railroad passengers, occupants of such cars, fixed prices for the use or accommodation of seats or sleeping berths therein; to also attend upon the occupants of such cars, and to secure to them, so far as practicable, a quiet and comfortable day's ride or night's rest.

That by the further terms and conditions of each of such

contracts, each of such railroad companies agreed at its own expense to haul such sleeping cars, drawing-room cars, and parlor cars over its part of such long, continuous, through lines of connecting railroads, extending interstate and between foreign nations, through or from other States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico, into, into and through, or into, through and out of the State of Kansas, and used in transporting railroad passengers interstate and between foreign nations; to also furnish fuel for such cars; to also light, wash and clean the same; to also keep such cars in good order and repair, except as to the carpets, upholstery, etc.; to also place for sale in the hands of its ticket agents at its several ticket offices, tickets for the use or accommodation of seats or sleeping berths in such cars without extra charge to your orator therefor, the proceeds of the sales of such tickets, however, to be at your orator's risk; all of which several and respective matters and things, together with such other and further provisions and the conditions as are in each of such contracts contained, but not material herein, will more fully and at large appear by reference to each of such contracts now in the possession of your orator, and by it ready to be produced in court, if so directed by your honors.

That your orator receives fixed prices for the use or accommodation of seats or sleeping berths in such sleeping cars, drawing-room cars, and parlor cars.

That all receipts by your orator for the use or accommodation of seats or sleeping berths in such sleeping cars, drawing-room cars and parlor cars were and are at the time of the receipt of the same returned directly into your orator's treasury at your orator's domicile, principal office and place of business in the county of Cook, in the State of Illinois, no part of the same ever being within either of the counties named or within the State of Kansas, except in transit to your orator's treasury at your orator's domicile, principal office and place of business in the county of Cook, in the State of Illinois.

That your orator is engaged in the business of running cars and transporting railroad passengers interstate to the extent herein stated.

That your orator receives no part of the consideration paid to railroad companies for the transportation of their passengers.

That such sleeping cars, drawing-room cars and parlor cars are used in transporting railroad passengers interstate and between foreign nations, and are employed exclusively in the business of interstate commerce, being cars in use on such long, continuous, through lines of connecting railroads extending interstate and between foreign nations, through or from other States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico, into, or into and through, or into, through and out of the State of Kansas—that is, beginning without the State of Kansas and extending into, or into and through, or into, through and out of the State of Kansas, or beginning within the State of Kansas and extending out of the State of Kansas, and not on lines local to the State of Kansas—that is, on lines beginning and ending in the State of Kansas; that such cars have no *situs* within any of the counties named, or within the State of Kansas, for the purposes of taxation, and the same should not be at any time assessed and taxed by any of the counties named, or by the State of Kansas.

That such sleeping cars, drawing-room cars, and parlor cars have their *situs*, and are subject to taxation at your orator's home or domicile, in the county of Cook, in the State of Illinois.

That your orator is each year assessed and taxed in the county of Cook, in the State of Illinois, upon its tangible property, as well as upon its capital stock.

That your orator has been assessed and taxed for the tax years of A. D. 1885 and A. D. 1886, in the county of Cook, in the State of Illinois, upon your orator's tangible property, as well as upon your orator's capital stock.

That your orator did not, at any time prior to or during

the year A. D. 1886, own, possess, occupy, control, or have any interest in any real or personal property subject to taxation within any of the counties named, or within the State of Kansas, and did not at any time prior to or during the year A. D. 1886 list or return any real or personal property for the purposes of taxation within any of the counties named, or within the State of Kansas.

That during the year A. D. 1886 the Board of Railroad Assessors for the State of Kansas, at the time required by law for assessing railroad property in the State of Kansas, in violation of duty, wrongfully and unlawfully, assumed to and did assess and value at $116,246.56, for the purposes of taxation, within the State of Kansas, for the year A. D. 1886, such sleeping cars, drawing-room cars, and parlor cars so owned by your orator, and so hired to such railroad companies and used by them in transporting railroad passengers interstate and between foreign nations, being cars employed exclusively in the business of interstate commerce, and in use on lines running interstate and between foreign nations—that is, on lines beginning within other States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico, and without the State of Kansas and extending into, or into and through, or into, through and out of the State of Kansas; or beginning within the State of Kansas and extending out of the State of Kansas into, or into and through, or into, through and out of other States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico, and not on lines local to the State of Kansas—that is, on lines beginning and ending in the State of Kansas—such sleeping cars, drawing-room cars, and parlor cars having no *situs* within any of the counties named or within the State of Kansas for the purposes of taxation; that the State Board of Equalization for the State of Kansas, in violation of duty, wrongfully and unlawfully, assumed to and did equalize and correct such assessed valuation so wrongfully and unlawfully made; that the Auditor of State for the State of Kansas, in violation

of duty, wrongfully and unlawfully, assumed to and did apportion such assessed valuation, so wrongfully and unlawfully made, equalized, and corrected, to each of the several counties named, being the several counties along the lines of the several railroads and railways of the several railroad and railway companies, defendants herein, according to the mileage of such railroads and railways in each of such counties, wrongfully and unlawfully certifying and returning such apportionments to the county clerks of the several counties to which the same were so apportioned, as follows: To the county clerks of the several counties along the lines of the Atchison, Topeka & Santa Fé Railroad Co., thirty-three thousand fifty-five dollars and thirty-nine cents ($33,055.39); to the county clerks of the several counties along the lines of the Kansas City, Topeka & Western Railroad Co., six thousand three hundred and seventy-eight dollars and forty-three cents ($6,378.43); to the county clerks of the several counties along the lines of the Marion & McPherson Railway Co., one thousand five hundred sixty-nine dollars and forty-five cents ($1,569.45); to the county clerks of the several counties along the lines of the Southern Kansas Railway Co., six thousand dollars ($6,000); to the county clerks of the several counties along the lines of the Wichita & Southwestern Railway Co., eight hundred and seventy-seven dollars and fifty cents ($877.50); to the county clerks of the several counties along the lines of the St. Louis, Fort Scott & Wichita Railroad Co., twenty-four thousand dollars ($24,000); to the county clerks of the several counties along the lines of the Kansas City, Fort Scott & Gulf Railroad Co., three thousand seven hundred and fifteen dollars and nine cents ($3,715.09); to the county clerks of the several counties along the lines of the Fort Scott, Southeastern & Memphis Railroad Co., six hundred and nine dollars and twenty-two cents ($609.22); to the county clerks of the several counties along the lines of the Missouri, Kansas & Texas Railroad Co., two thousand and eighty-three dollars and ninety-eight cents ($2,083.98); to the county clerks of the

several counties along the lines of the Missouri Pacific Railway Co., or its Kansas extensions, nine thousand two hundred and fifty-one dollars and nine cents ($9,251.09); to the county clerks of the several counties along the lines of the Union Pacific Railroad Co., Kansas division, twenty-eight thousand seven hundred and six dollars and forty-one cents ($28,706.41).

That there became and was, in the several counties named, wrongfully and unlawfully levied against your orator, upon such apportionments of such assessed valuation so wrongfully and unlawfully made, a large and burdensome tax in the aggregate amounting to more than five thousand dollars ($5,000.00.)

That the county clerks of the several counties named have extended upon the tax-rolls or books of such counties such taxes so wrongfully and unlawfully levied, and have delivered such tax-rolls or books or duplicates thereof to the county treasurers of such counties, defendants herein; that such county treasurers, defendants herein, are now wrongfully and unlawfully threatening to enforce the collection of such taxes so wrongfully and unlawfully levied, and for such purpose, if not restrained and enjoined from so doing, will seize, detain, and sell such sleeping cars, drawing-room cars, and parlor cars belonging to your orator and hired to such railroad companies for use by them in operating such long, continuous, through lines of connecting railroads extending interstate and between foreign nations, through or from other States and Territories, the Dominion of Canada, and the Republic of Mexico, into, into and through, or into, through and out of the State of Kansas, and in transporting railroad passengers, interstate and between foreign nations, to satisfy such tax.

That the enforcement of the collection from your orator of such tax so levied upon such portions of such assessed valuations would result in great and irreparable injury and manifest wrong to your orator, and would be contrary to equity and good conscience.

That your orator has been at all times, and is now willing,

ready, and able to pay any reasonable taxes lawfully levied upon any reasonable valuation of any taxable property owned by your orator within any of the counties named, or within the State of Kansas, for the year A. D. 1886, and is now willing, ready, and able to pay the same, if there be any, and hereby offers to pay the same, if there be any, together with such reasonable interest and penalties thereon, if there be any, as your honors may direct.

That your orator is now willing, ready, and able to do, and hereby offers to do, in the premises any and all things that in equity and good conscience may be required of it to be done, and to this end asks your honors to direct what should be done, if anything, other and further than what has been done or is offered to be done by your orator.

That your orator now owns and has an interest in about eleven hundred sleeping-cars, drawing-room cars, and parlor cars, all hired to railroad companies for use by them throughout the several States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico, in like manner and under like contracts, as sleeping-cars, drawing-room cars, and parlor cars herein first referred to, are hired to the railroad companies herein first referred to.

That your orator has thus established and is now operating and maintaining a reputable and profitable system of sleeping-car, drawing-room-car, and parlor-car service over long, continuous, through, connecting lines of railroads, extending, interstate and between foreign nations, throughout the several States and Territories of the United States of America, the Dominion of Canada, and the Republic of Mexico.

That your orator furnishes to railroad passengers for fixed prices, all paid at one time and place, the use or accommodation of seats or sleeping berths in such sleeping cars, drawing-room cars, and parlor cars over such long, continuous, through, connecting lines of railroads extending interstate and between foreign nations.

That if the treasurers of the several counties shall be permitted to enforce the collection from your orator of such taxes

so wrongfully and unlawfully levied upon such assessed valuation so wrongfully and unlawfully made on account of such sleeping cars, drawing-room cars, and parlor cars, so owned by your orator, by levying upon, seizing, detaining and selling such cars, or any one or more of them, as they are now threatening to do, the same will interfere with, break up and obstruct the reputable and profitable system of sleeping-car, drawing-room-car and parlor-car service so established and now operated and maintained by your orator over such long, continuous, through, connecting lines of railroads extending interstate and between foreign nations; will greatly inconvenience and discommode the traveling public — railroad passengers — being transported interstate and between foreign nations, on account of your orator being unable to furnish them with the use and accommodation of seats or sleeping berths in such sleeping cars, drawing-room cars, and parlor cars, when required and demanded by them, in like manner as are now furnished to the traveling public — railroad passengers; will cause your orator to violate and fail to perform the terms and conditions of your orator's part of the contracts of the sales to railroad passengers of the use or accommodation of seats or sleeping berths in such sleeping cars, drawing-room cars, and parlor cars, over such long, continuous, through lines of connecting railroads extending interstate and between foreign nations; will cause your orator to violate and fail to perform the terms and conditions on your orator's part of the contracts between your orator and such railroad companies; will subject your orator to a multiplicity of harassing and annoying law-suits by the traveling public — railroad passengers — and by such railroad companies for damages on account of such violation and failure to so perform the terms and conditions on your orator's part of such contracts; and place in disrepute and greatly injure your orator's reputable and profitable system of sleeping-car, drawing-room-car and parlor-car service, so established, operated and maintained, subjecting your orator to great pecuniary loss and irreparable injury.

That each of the railroad and railway companies named, defendants herein, now claims that it is liable for and will be compelled to pay such taxes, so wrongfully and unlawfully levied upon such apportionments of such assessed valuation so wrongfully and unlawfully made in the several counties along the lines of the railroads and railways of each of such railroad and railway companies, and unless restrained and enjoined from so doing will pay such taxes, to the great injury and wrong of your orator, and when they have so paid the same will collect, or attempt to collect, the amounts so paid from your orator.

In consideration whereof, and forasmuch as your orator is remediless in the premises under the strict rules of the common law, and can only have adequate relief in a court of equity, where matters and things of such nature and character are properly cognizable and relievable.

To the end, therefore, that the said defendants may, each and every of them, full, true, direct and perfect answers make to all and singular the premises, but not under oath — answer under oath being hereby expressly waived — and that as fully and particularly as if the same were here repeated, and they and each of them interrogated thereunto; and that, pending the final hearing of this your orator's bill of complaint, your honors will grant unto your orator a temporary restraining order or injunction, issuing out of and under the seal of this honorable court, restraining and enjoining the several treasurers of the counties named, defendants herein, or any or either of them, jointly or severally, together with any or either of them, jointly or severally, together with any or either of their attorneys, agents, clerks, employés, and servants, from further proceeding in any manner or form whatever to collect or attempt to enforce the collection of such taxes so wrongfully and unlawfully levied upon such apportionments of such assessment so wrongfully and unlawfully made, and restraining and enjoining the several railroad and railway companies named, defendants herein, or any or either of them, jointly or severally, together with any or

either of their attorneys, agents, clerks, employés, and servants, from paying to any or either of the treasurers of the counties named, defendants herein, any of the taxes so wrongfully and unlawfully levied upon such apportionments of such assessments so wrongfully made, and that upon the final hearing herein, said injunctions may be made perpetual; and that your orator may have such other, further or different relief in the premises as the nature of this case may require and to your honors may seem meet.

May it please your honors to grant unto your orator not only the writs of injunction herein prayed, but also a writ of subpena directed to the said H. H. Hayward, treasurer of the county of Allen; J. M. Herriman, treasurer of the county of Anderson; T. J. Emlen, treasurer of the county of Atchison; L. F. Wever, treasurer of the county of Barton; John J. Stewart, treasurer of the county of Bourbon; Thos. McLaughlin, treasurer of the county of Brown; John H. Austin, treasurer of the county of Butler; Wm. P. Martin, treasurer of the county of Chase; E. C. Scammon, treasurer of the county of Cherokee; J. B. Nipp, treasurer of the county of Cowley; S. R. Tuttle, treasurer of the county of Crawford; C. B. Stebbins, treasurer of the county of Davis; John J. Cooper, treasurer of the county of Dickinson; H. L. Moore, treasurer of the county of Douglas; W. L. Hobbs, treasurer of the county of Edwards; C. W. Rambo, treasurer of the county of Elk; Geo. Phillips, treasurer of the county of Ellis; A. Schmidt, treasurer of the county of Ellsworth; R. M. Wright, treasurer of the county of Ford; J. N. Harrison, treasurer of the county of Franklin; D. R. Menke, treasurer of the county of Finney; W. H. Drew, treasurer of the county of Greenwood; Frank Bentley, treasurer of the county of Hamilton; O. F. Casteen, treasurer of the county of Harper; Edward L. Parris, treasurer of the county of Harvey; J. H. Johnson, treasurer of the county of Jefferson; Solon R. Rogers, treasurer of the county of Johnson; Chas. W. Littleton, treasurer of the county of Labette; J. W. Spratley, treasurer of the county of Leavenworth; A. W.

Burton, treasurer of the county of Linn; C. T. Cavaness, treasurer of the county of Lyon; R. O. Nelson, treasurer of the county of Marion; Charles A. Chaplin, treasurer of the county of McPherson; J. H. Phillips, treasurer of the county of Miami; M. F. Wood, treasurer of the county of Montgomery; H. Lodge, treasurer of the county of Neosho; Edward Spaulding, treasurer of the county of Osage; W. H. Brown, treasurer of the county of Pawnee; H. P. Smith, treasurer of the county of Pottawatomie; A. W. McCandless, treasurer of the county of Reno; C. W. Shumway, treasurer of the county of Rice; Jas. M. Fortner, treasurer of the county of Riley; C. M. Harshbarger, treasurer of the county of Russell; Clarence Wilson, treasurer of the county of Saline; Geo. W. Walter, treasurer of the county of Sedgwick; Byron Roberts, treasurer of the county of Shawnee; R. A. Anderson, treasurer of the county of Sumner; Chas. H. Gibbs, treasurer of the county of Trego, and *ex-officio* tax collector for the counties of Gove, St. John, and Wallace; M. F. Stewart, treasurer of the county of Woodson; Benjamin Schnierle, treasurer of the county of Wyandotte; the Atchison, Topeka & Santa Fé Railroad Company; the Kansas City, Topeka & Western Railroad Company; the Marion & McPherson Railway Company; the Southern Kansas Railway Company; the Wichita & Southwestern Railroad Company; the St. Louis, Fort Scott & Wichita Railroad Company; the Kansas City, Fort Scott & Gulf Railroad Company; the Missouri, Kansas & Texas Railroad Company; the Fort Scott, Southeastern & Memphis Railroad Company; the Missouri Pacific Railway Company, and the Union Pacific Railroad Company, commanding them and each of them, on a day and under a penalty therein to be limited, personally to be and appear before this honorable court, then and there to answer all and singular the premises, and further to stand to, perform, and abide such further order and decree herein as to your honors shall seem meet.

And your orator will ever pray, etc.

PULLMAN'S PALACE CAR CO.,
By WILLIAM BURRY, *Solicitor.*

ALFRED ENNIS, *of Counsel.*

STATE OF ILLINOIS, COUNTY OF COOK, *ss.:*

Alfred S. Weinsheimer, of lawful age, being duly sworn according to law, states upon his oath that he is the secretary of Pullman's Palace Car Company, the complainant in the above and foregoing bill of complaint, and is acquainted with the contents thereof; that the material allegations therein contained are true of his own knowledge, except such matters as are therein stated upon information and belief, and as to these matters he believes them to be true; and further he says not.

A. S. WEINSHEIMER.

Subscribed and sworn to before me, the undersigned, this November 11, A. D. 1886.

[Seal.] AMBROSE RISDON, *Notary Public.*

The defendants, The Missouri Pacific Railway Company, The Missouri, Kansas & Texas Railway Company, The St. Louis, Fort Scott & Wichita Railroad Company, filed their separate answers, alleging in substance that they were not advised and had no means of knowing whether the allegations of complainant's bill were true or not, and therefore neither affirmed nor denied the same.

The defendants, The Atchison, Topeka & Santa Fé Railroad Company, The Kansas City, Topeka & Western Railroad Company, The Wichita & Southwestern Railroad Company, The Kansas City, Fort Scott & Gulf Railroad Company, answered, admitting all of the several matters and things stated in the bill of complaint to be true for the purposes of the suit.

The defendants, H. H. Hayward *et al.*, filed their demurrer to the bill in words and figures following:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

The joint and several demurrer of the defendants, H. H. Hayward, treasurer of the county of Allen; J. M. Herri-

man, treasurer of the county of Anderson; T. J. Emlen, treasurer of the county of Atchison; L. F. Wever, treasurer of the county of Barton; John J. Stewart, treasurer of the county of Bourbon; Thos. McLaughlin, treasurer of the county of Brown; John H. Austin, treasurer of the county of Chase; E. C. Scammon, treasurer of the county of Cherokee; J. B. Nipp, treasurer of the county of Cowley; S. R. Tuttle, treasurer of the county of Crawford; C. S. Stebbins, treasurer of the county of Davis; John J. Cooper, treasurer of the county of Dickinson; H. L. Moore, treasurer of the county of Douglas; W. L. Hobbs, treasurer of the county of Edwards; C. W. Rambo, treasurer of the county of Elk; Geo. Phillips, treasurer of the county of Ellis; A. Schmidt, treasurer of the county of Ellsworth; R. M. Wright, treasurer of the county of Ford; J. N. Harrison, treasurer of the county of Franklin; D. R. Menke, treasurer of the county of Finney; W. H. Drew, treasurer of the county of Greenwood; Frank Bently, treasurer of the county of Hamilton; O. F. Casteen, treasurer of the county of Harper; J. H. Johnson, treasurer of the county of Jefferson; Solon R. Rogers, treasurer of the county of Johnson; Chas. W. Littleton, treasurer of the county of Labette; J. W. Spratley, treasurer of the county of Leavenworth; A. W. Burton, treasurer of the county of Linn; C. T. Cavaness, treasurer of the county of Lyon; R. O. Nelson, treasurer of the county of Marion; Chas. A. Chaplin, treasurer of the county of McPherson; J. H. Phillips, treasurer of the county of Miami; M. F. Wood, treasurer of the county of Montgomery; H. Lodge, treasurer of the county of Neosho; Edward Spaulding, treasurer of the county of Osage; W. H. Brown, treasurer of the county of Pawnee; H. P. Smith, treasurer of the county of Pottawatomie; A. W. McCandless, treasurer of the county of Reno; Jas. M. Fortner, treasurer of the county of Riley; C. M. Harshbarger, treasurer of the county of Russell; Clarence Wilson, treasurer of the county of Saline; Geo. W. Walter, treasurer of the county of Sedgwick; Byron Roberts, treasurer of the county of Shawnee; R. A. Ander-

son, treasurer of the county of Sumner; Chas. H. Gibbs, treasurer of the county of Trego, and *ex-officio* tax collector for the counties of Gove, St. John, and Wallace; M. F. Stewart, treasurer of the county of Woodson; and Benjamin Schnierle, treasurer of the county of Wyandotte, to the complaint of the Pullman's Palace Car Company:

These defendants, by protestation, not confessing any of the matters in and by said bill complained of to be true in manner and form as the same are set forth, severally say that they are advised that there is no matter or thing in said bill good and sufficient in law to call these defendants to account in this honorable court for the same, but that there is good cause of demurrer thereunto; and they do demur accordingly, and for causes of demurrer say that said bill, in case the same were true, contains no matter of equity whereon this court can ground any decree or give complainant any relief as against these defendants. Wherefore, and for divers other errors in said bill contained and appearing on the face thereof, these defendants do demur thereto, and humbly crave the judgment of this honorable court whether they are compellable or ought to make any answer thereunto otherwise than as aforesaid; and these defendants humbly pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

S. B. Bradford and Edwin A. Austin,
Attorneys for Defendants.

I hereby certify that in my opinion the above and foregoing demurrer is well founded in point of law.

Edwin A. Austin,
Of Counsel for Defendants.

State of Kansas, Shawnee County, *ss.:*

Byron Roberts, being first duly sworn, deposes and says that he is treasurer of Shawnee county, Kansas, and one of the defendants in the above-entitled action; that the above

and foregoing demurrer is not interposed for delay; and further deponent saith not. BYRON ROBERTS.

Subscribed and sworn to before me, this 12th day of February, 1887. D. N. BURDGE, *County Clerk.*

[Seal.]

On November 18, 1886, a temporary injunction was allowed in the case, restraining the defendant County Treasurers from enforcing or collecting the taxes levied upon the sleeping cars of appellant company, and restraining the defendant Railroad Companies from paying to any of the said county treasurers any of the taxes levied against said railroad companies upon the assessments made upon the sleeping cars of the appellant company.

On February 18, 1887, the case was heard upon the bill of complaint and the demurrer of said Hayward *et al.;* and upon such hearing the demurrer was sustained, the temporary injunction dissolved, and the bill of complaint dismissed for want of equity. An appeal to this court was thereupon prayed for by the Pullman's Palace Car Company, and granted by the court.

The statute of the State of Kansas under which the assessment and levy of the taxes upon appellant company's property were made, is article 7 of chapter 107, Compiled Laws of 1885, pp. 951, 952 and 953, and certain additional sections of said chapter 107, and is as follows:

"SEC. 25. The property of railroads and railroad corporations shall be assessed annually in the manner prescribed in this act.

"SEC. 26. For the purpose of assessment of railroads and the property of railroad corporations, the Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, and the Attorney General, are hereby constituted a Board of Railroad Assessors, who are empowered, and it is hereby made their duty, to assess all the property of the railroads and railroad corporations in the State of Kansas: *Provided*, That nothing in this section contained shall be construed to include

within the meaning of this act any real estate in this State owned by any railroad company, and not used, or necessary to be used, for the convenient and daily operation of its railroads; nor shall it include any buildings that are not in whole or in part situated upon the right-of-way of such road, but such real estate shall be assessed and taxed in the same manner as other real estate, anything in this section to the contrary notwithstanding.

"SEC. 27. Said Board shall meet at the office of the Auditor of State, on the third Monday in April, in the year eighteen hundred and seventy-six, and each year thereafter, for the purpose of assessing the property of railroads. The Lieutenant Governor shall be president, and the Auditor of State shall be secretary, of said Board; but either of said offices shall be filled temporarily by the members present, in case of the absence of either of the above-named officers. Said Board may make such rules and regulations, not inconsistent with this act, whereby to regulate their proceedings. Three members shall constitute a quorum for the transaction of business, and a majority of a quorum shall decide all questions. It shall be the duty of the secretary of the Board to keep correct and accurate minutes of all the proceedings of the Board, in a book to be furnished by the State Auditor, and by the Auditor kept for that purpose. The Board, when properly organized as herein provided for, shall proceed to ascertain all the personal property of any railway company owning, operating or constructing a railway in this State, which, for the purposes of assessment and taxation, shall be held to include the track, road-bed, right-of-way, water and fuel stations, buildings, and land on which they are situated, adjacent to or connected with the right-of-way, machinery, rolling stock, telegraph lines, and all instruments connected therewith, material on hand and supplies provided for operating and carrying on the business of such railroad, together with the moneys, credits and all other property of such railway company, used or held for the purpose of operating its railroad by such railway company, and appraise and assess such property at its actual value in money.

"SEC. 28. Every person, company or corporation, owning, operating or constructing a railroad in this State, shall return sworn lists or schedules of the taxable property of such railroad company or corporation as hereinafter provided. Such property shall be listed with reference to the amount, kind and value, on the first day of March in the year in which it is listed.

"SEC. 29. On or before the twentieth day of March, eighteen hundred and seventy-six, and at the same time in each year thereafter, the person, company or corporation owning, operating or constructing any railroad in this State shall, by its president, secretary, or principal accounting officer, return to the Auditor of State a sworn statement or schedule, as follows: . . . *Fifth*, A full list of the rolling stock belonging to or operated by the person, company or corporation, which

shall distinctly set forth the number, class, and value of all locomotives passenger cars, sleeping cars, dining cars, express cars, mail cars, baggage cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, and all other kind of cars owned or leased by said company.

"SEC. 30. All sleeping, dining, palace, or other cars that make regular trips over any railroad in this State, and not owned by such railroad company, shall be listed by the manager, agent or conductor, or other person having such cars in charge, and return made to State Auditor the same as is required of railroad companies, and the company operating or using said cars shall be held liable for the taxes due thereon."

"SEC. 33. The Board of Railroad Assessors, after having valued and assessed all the railroad property in this State in accordance with the provisions of this article, shall through the Auditor of State make returns to the county clerks of each and every county in which any portion of said railroad property, as designated in this article, may be located.

"SEC. 34. Such returns shall be as follows: First, number of miles of main track located in each city and township in the county, and the total length in the county. Second, the average valuation per mile; such valuation to include the following items: Track, right-of-way, franchises, road-bed, rolling stock, telegraph lines and instruments connected therewith, material on hand, supplies and tools, and all other property used in the operation of the road, and all moneys and credits. Third, the average valuation per mile of all personal property enumerated in this article. Fourth, the amount of valuation that shall be placed to the credit of each city and township in the county, as heretofore provided for in this section.

"SEC. 35. Such returns shall include a full list, with city and township where located, of all second or side tracks, turnouts, depots, station houses, machine shops, or other buildings, situated wholly or in part on the right-of-way, platforms, fuel and water stations, with the machinery and tanks connected therewith, giving the length of each second or side track or turnout, and the assessed value of each item in the list.

"SEC. 36. The Auditor of State shall make the return contemplated in this article on or before the twentieth day of May in each year."

"SEC. 38. The county clerk, as soon as he shall have received the return of railroad assessment from the Auditor of State, shall certify to the proper officer of the different school districts, cities and townships in his county, in or through which any portion of the railroad is located, the amount of such assessment that is to be placed on the tax-roll for the benefit of such school district, city or township, and he shall at the proper time place such assessment on the proper tax-roll of his county, subject to the same per cent. of levy for different purposes as in other property."

"SEC. 76. The county clerk, immediately after the Board of Equalization shall have completed its labors, shall prepare an abstract of the assessment rolls of his county, and forward it to the State Auditor on or before the first day of July. Such abstract shall contain:

. . . . . .

"SEC. 78. The State Board of Equalization shall consist of the Secretary of State, State Auditor, and State Treasurer.

"SEC. 79. It shall be the duty of said Board to assemble at the State capitol on the second Wednesday in July, in the year A. D. eighteen hundred and seventy-six, and of each year thereafter, and when duly organized, as hereinafter provided, to then and there proceed to examine the abstracts of property assessed for taxation in the several counties of the State, including railroad property, which shall be laid before said Board by the Auditor of State, and shall equalize the same by directing to be added to the amount of property so assessed in each county, or to be deducted therefrom, such rate per cent. as said Board may deem equitable; but said Board shall not reduce the aggregate amount. Said Board when assembled, shall organize by electing one of their number as chairman, and appointing a secretary and such other officers to conduct the business of said Board as may in the discretion of said Board be deemed necessary. The Secretary of State shall furnish for the use of said Board such stationery, printing, postage, fuel, lights, and rooms, as may be required for the use of said Board. The said Board of Equalization shall apportion the amount of tax for State purposes, as required by law to be raised in the State, among the several counties therein, in proportion to the valuation of the taxable property therein, for the year, as equalized by the Board.

"SEC. 80. It shall be the duty of the State Auditor to compile the abstracts of assessments received from the county clerks, into tabular statements, convenient for the use of said Board, which statements and the original abstracts shall be submitted to the Board on the first day of the session thereof in each year. It shall also be his duty to report the action of said Board to the several county clerks, under his official seal, immediately upon the adjournment of said Board.

"SEC. 81. It shall be the duty of the county clerk in each county, when he shall have received the report of the Auditor, as provided in section eighty of this act, to determine the rate per cent. necessary to raise the taxes required for State purposes as determined by the State Board of Equalization, and place the same upon the tax-roll of the county, in the manner prescribed by section eighty-four of this act."

"SEC. 84. The county clerk, immediately after the first Monday in August, shall proceed to determine the sums, in dollars and cents, rejecting fractions of a cent, to be levied upon each tract or lot of real property, in the name of the owner, if known, and upon the amount of personal property, in the name of each person, company, or corporation, which shall be assessed equally upon all real and personal prop-

erty subject to the same tax, and set down all taxes in one column, school-district and road taxes excepted. He shall complete the same and attach his certificate thereto, and deliver it to the county treasurer on or before the first day of November; and shall charge the treasurer with the amount of the respective taxes assessed on the tax-roll. For every day after the first day of November that the county clerk shall retain such tax-roll in his possession, the county board shall deduct from his pay five dollars."

The attention of the court is particularly called to sections 27, 29, 30, 33 and 38 of the above statute.

Under the authority of said section 30, the Pullman sleeping, dining and palace cars making regular trips over the roads of defendant railroad companies in the State of Kansas were assessed for taxation by the State Board of Railroad Assessors to the several railroad companies by whom the said Pullman cars were so operated and used.

Under the authority of said section 33, the Auditor of State made returns to the several county clerks of such assessment for taxation.

Under said section 38, the county clerks placed the assessment on the proper tax-rolls of their several counties, and the same rate per cent. of taxation was levied upon said property as upon other property in the State of Kansas, for State, county, township, municipal, school-district and other lawful purposes.

The tax-rolls, including the assessment and levy upon the Pullman cars, were, under the Kansas statutes, delivered to the defendant county treasurers for the collection of the taxes.

These taxes so assessed and levied for the year 1886, upon the Pullman cars making regular trips over the railroads in Kansas, are the taxes the collection of which is sought by this action to be perpetually enjoined.

I.

It is claimed by the appellant company that the Pullman cars in question are personal property, and that as personal property it is taxable only at its domicile, which is in Cook county, in the State of Illinois.

A line of authorities apparently sustain this position of the appellant. The cases of *Hays vs. The Pacific Mail Steamship Co.*, 17 How. 596, and *St. Louis vs. The Ferry Co.*, 11 Wall. 425, are relied upon for the purpose.

In Burroughs on Taxation, 186, it is stated that "A corporation is taxable for its personal property at its domicile, which is the State of its creation, and within that State in the town where it has its principal office or place of business."

The case of *Orange & Alexandria Railroad Company vs. City Council of Alexandria*, 17 Gratt. 186, is also relied upon. The court in that case uses the following language:

> "Upon this state of facts, I am of opinion that the railroad company must be considered as having its residence or domicile in Alexandria, and that its rolling stock, though in daily use upon the road and absent from the city the greater part of the time, is to be considered as belonging there, and is liable to taxation by the city."

Perhaps one of the strongest decisions in favor of this claim of the appellant is to be found in the case of the *Phil., Wilm. & Balto. R. R. Co. vs. Appeal Tax Court of Baltimore City*, 50 Md. 415. In this case the court says:

> "It is plain that the rolling stock of the company cannot have permanent location or legal *situs* at two or more places at the same time, unless so declared by positive statute; and conceding that it should be located at the domicile or home or principal office of the corporation, it is clear, as the law now stands, there can be no well-founded claim to assess this property in Baltimore. The engines and cars of the appellant have no abiding-place or permanent location in this State, so as to become incorporated with the other permanent property of the

State, and are only brought here transiently while employed in the operations of the road. And whether such engines and cars be regarded as personal property, or as so far partaking of the nature of realty as to justify the denomination of them as movable fixtures, the principle equally applies. They have the movable quality, and in the absence of positive legislation fixing a different *situs*, they can have no other given them by construction than the home or principal office of the corporation."

The following cases in addition to those above mentioned are usually cited as further sustaining this claim made by the appellant:

Appeal Tax Court v. Pullman Palace Car Co., 50 Md. 542.
Louisville & Nashville Rly. Co. v. State, 25 Ind. 177.
Randall v. Elwell, 52 N. Y. 521.
Pacific R. R. Co. v. Cass Co., 53 Mo. 17.
Dubuque v. Illinois Central R. R. Co., 39 Ia. 56.
Porter v. Rockford, R. I. & St. L. R. R. Co., 76 Ill. 561.
Irvin v. N. O., St. L. & C. R. R. Co., 94 Ill. 105.

Another case relied upon to sustain this claim of appellant is that of *Pullman Southern Car Co. v. Montgomery County*, 17 Am. and Eng. R. R. Cases, 398, a case decided in the U. S. Circuit Court, M. D. Tenn., in October, 1884, as touching upon this question of the *situs* of appellant's cars for the purposes of taxation. MATTHEWS, J., in delivering the opinion of the court in that case, says:

"In the present case the Pullman Southern Car Co., a corporation of Kentucky, has no domicile in Tennessee, and is not personally subject to its jurisdiction for purposes of taxation, and sleeping cars which it runs and uses upon the railroads of that State, in the transportation of passengers into and from it, from and into other States, has no *situs* within that State, for purposes of taxation. They are not brought into the State for the purpose of being employed in a business carried on within it, and do not become a part of the mass of property within the jurisdiction of the State for purposes of taxation. They are in the State only as passing to and from it, while in the act of transportation, performed by virtue of a right, secured to the owners of them, not by the authority of the laws of Tennessee, but by virtue of a right secured by the exclusive jurisdiction of Congress under the constitution."

With the greatest respect for the authority of the decisions hereinbefore referred to, we respectfully submit that so far as they hold that the property in question in this case has no *situs* whatever for the purposes of taxation within the State of Kansas, they are inapplicable in the light of the Kansas statute herein set out, and are not in accord with the latest and most authoritative decisions concerning the taxation of railroad property under recent legislation in the several States. The authority of these decisions if carried to the full length apparently indicated by the language used by the courts in rendering them, would seem to confine the taxation of all the Pullman sleeping and drawing-room cars used throughout the States and Territories not only to the State of Illinois, of which the appellant company is a resident, but to the single county of Cook within that State, the immediate domicile of the Pullman Palace Car Company. But in the State of Illinois the Supreme Court in the case of *Kennedy v. St. L. B. & P. H. R. Co.*, 62 Ill. 395, has decided that the Pullman Palace cars, although not owned by the railroad companies operating them, should be included in the rolling-stock of the defendant railroad company for the purposes of taxation, and that the *situs* of such cars for taxation was in the several counties within the State through which the road of the defendant railroad company passed, and that the taxes levied upon these palace cars should be distributed along the line of the road in the several counties the same as the taxes levied upon the other railroad property of the defendant company was distributed. The effect of this decision was to establish the *situs* of the Pullman sleeping cars for taxation within the State of Illinois outside of Cook county, the immediate domicile of the owner of such cars. This decision is also authority for the proposition contended for by the de-

fendant county treasurers in this action, that it is not necessary that the cars in question should be the property of the several railroad companies using and operating them, and to which they were assessed in the various counties in Kansas for the purposes of taxation.

To a like effect is the decision of the Supreme Court of Missouri in the case of *The State, ex rel., v. Severance et al.*, 55 Mo. 378. In this case the court makes use of the following language:

"But it is argued with great earnestness that in the phrase 'all other property,' is included the rolling stock of the railroad, and that the company having its chief offices for the transaction of its business in the city of St. Joseph, there and there alone this property should be assessed and made liable for taxes; that though constantly used in other counties through which the road passes, in the transaction of the business of the road, still its only *situs* is where the chief office is located, and there it must be taxed.

"The proposition is undoubtedly true, that where a corporation has its residence, there the property of this description is liable to assessment and taxation, if the law has prescribed no different rule or regulation on the subject. This notion of the *situs* of personal property following the personal residence of the corporation is a legal fiction, but is not an unbending and uncontrollable principle of law. It may be modified by the legislature. The rolling stock of a company is in a constant state of transition, and has no more real local existence in one county than another. A county through whose whole length it runs might well think that it had as much right to tax it as a city that it passed through but for a mile or two at most; but both would have no right to levy a tax, for that would be double taxation upon the same property.

"This machinery, by which the road is operated, is constantly passing from one terminus to the other of the entire road, and to save all cavil and dispute in respect to it, it was perfectly competent for the legislature to say that it should become a part of the road itself, and become property the same as the road, and that for the purposes of taxation it should be equally distributed through the counties, cities or towns through which it passed, in proportion to its length in those respective localities.

In the case of *Carlisle v. Pullman Palace Car Co.*, 8 Col. 320, it seems that certain sleeping cars of the appellant com-

pany were operated under contracts similar to those recited in the bill of complaint in this case on the lines of the Atchison, Topeka & Santa Fé Railroad Company in Colorado, during the years from 1876 to 1881 inclusive, and by the Denver & Rio Grande Railroad Company upon its lines in Colorado during the years from 1880 to 1881 inclusive. During all of said years no return was made or statement furnished to the State Board of Equalization of that State of the number and value of said sleeping cars, as required by its revenue laws, either by the railroad companies or by the Pullman Car Company, and that no assessment of said sleeping cars for taxation was made by the State Board for the years aforesaid. The railroad property being thus omitted from taxation, the taxing officers of Pueblo county assessed and taxed the sleeping cars for those years, and, the payment thereof being resisted, were seeking to collect the taxes from the Pullman Car Company by suit. The Supreme Court denied the right of the Pueblo county taxing officers to make such assessment, levy and collection of taxes, upon the ground that while railroad property of the character of the property in question was subject to taxation in the State, the authority to make the assessment was in the State Board of Equalization solely, and that the county officials of Pueblo county had no right or authority under the law to make any such assessment. In that case, it was urged by the Pullman Car Company that it could not be held liable for any taxes upon its sleeping cars in the State of Colorado, for the reason that its home office and domicile were in the State of Illinois, and that it had neither home office nor any principal place of business within the State of Colorado, and that the property in question had no *situs* for taxation in that State. The court, in passing upon this question involved in that case, says:

"The constitution of this State, and the laws passed in pursuance thereof, subject all property, real and personal, within the State to taxation, that shall not be expressly exempted by law. The property assessed by the officials of Pueblo county was personal property within the State, and it was not exempt by law. Law-writers say, in reference to personal property, that it matters not whether the owner be a private person or a corporation—a resident or a non-resident, or whether the property be permanently located within the State, or be merely employed therein, it is subject to taxation. The conceded principles governing this subject are, that justice demands that all property in the State, not exempt by law, shall be subject to taxation; that no person or class of persons, whether natural or artificial, shall escape the burdens of supporting the government, and that corporations shall have no greater exemptions in the matter of taxation than are extended to every citizen of the State.

"Articles of commerce in transition are exempt; but no such articles or question is involved in this case. The nature or character of the articles involved in the present controversy, and the purposes for which they were employed by both contracting parties, bring them within that class of property mentioned in our statute as railroad *equipment* and *rolling stock*.

"But it appears from the stipulation of facts that the real owner of this property is a non-resident corporation, and it does not appear that the owner has a home office or principal place of business within the State. It affirmatively appears that the property is in a constant state of transition, passing from point to point through the State, and some of it, as before stated, passing beyond the limits of the State. Under such circumstances, it has no more local existence in one county than in another, of those through which it passes.

"Transitory personal property must have a *situs* for taxation, or it is not subject to any jurisdiction. To hold otherwise would be to subject such property to the jurisdiction of every county wherein it chanced to be on the annual assessment-day; and the law is well settled that no class of property can be subjected to such burdens. This would be carrying the power of taxation to the extent of destruction—an abuse not even to be presumed. (*Ogilvie v. Crawford Co.*, 2 McCreary, 148; *Carrier v. Gordon*, 21 Ohio St. 605; *Hoyt v. Commissioners*, 23 N. Y. 224.)

"The law is, that the residence or principal place of business in the State of the owner, agent, or other person legally interested in movable property, is the *situs* of such property for the purpose of assessment and taxation, although it is liable to be in several different counties every day. See authorities *supra; State v. Severance*, 55 Mo. 379–388; *Walton v. Westwood*, 73 Ill. 125.

"In view of these principles and the facts set out in the agreed statement, no difficulty is met in determining the *situs* of the property

under consideration. The railroad companies have possession and control of the property, under contracts to continue, at their option, for a long term of years, and during which term they use these cars for the same purposes as they use their first-class passenger cars, and probably realize as much profit therefrom. This possession, control and community of interest which the railway companies have and exercise gives the sleeping-cars the same *situs* under the statute applicable to this class of property as articles of the same class owned by the railroad corporations."

The sleeping, drawing-room, and palace cars of the appellant company making regular trips over the railroads in the State of Kansas and in the other States and Territories of the United States, are property; and as such property they receive the protection of the laws of the State of Kansas and of the other States and Territories. Because of this protection, this property ought to share in the burdens of taxation. These cars making regular trips over the railroads in Kansas constitute a portion of the rolling stock of such railroads. They have the same kind of *situs* for the purposes of taxation and for all other purposes that the other rolling stock used in the operation of these railroads has. They are leased to the railroad companies. They are used by the railroad companies to accommodate their passengers. When making these regular trips, they constitute an integral and important part of each first-class passenger train. The statute of Kansas does not require the railroad company to be the absolute owner of these cars in order to make them taxable. By sec. 34, *supra*, the track, right-of-way, franchises, road-bed, rolling-stock, telegraph lines and instruments connected therewith, material on hand, supplies and tools, and all other property *used in the operation of the road*, are taxable to the railroad companies using the same. By sec. 30, *supra*, the railroad companies using and operating sleeping, dining, palace, or other cars that make regular trips over any railroad

in the State, when not owned by the railroad company using them, are held liable for the taxes due thereon.

The defendant, the Missouri Pacific Railroad Company, is not a Kansas corporation. As to that State it is a foreign corporation, having its domicile and place of residence in the State of Missouri. This railroad company has many miles of its road within the State of Kansas, which it operates in connection with its road in Missouri and Colorado, and other States. It operates through passenger trains from Kansas City in the State of Missouri, through the State of Kansas, and to Pueblo in the State of Colorado. These through trains are made up of a locomotive, tender, baggage, postal and express cars, smokers, ordinary passenger cars, and Pullman sleepers. The railroad company employs all classes of these cars in the operation of its through passenger trains, and these through passenger trains make regular daily trips through the entire length of the State of Kansas, a distance of over four hundred miles. That the locomotive, express, postal, baggage, smoking and ordinary passenger cars have a *situs* within the State of Kansas for the purposes of taxation, never seems to have been questioned. The taxes are and have been paid from year to year by this foreign railroad corporation upon all these several classes of property. Why the Pullman sleeper making the same regular trips and constituting a portion of the same through passenger train, should be exempt from taxation by reason of the fact that it has no *situs* in Kansas for the purposes of taxation, seems a little remarkable. Take another illustration: One of the regular trips made by the Pullman sleepers used and operated by the Atchison, Topeka & Santa Fé Railroad Company, consists of a run from Kansas City, Missouri, over the main line of the Santa Fé Railroad passing through Lawrence,

Topeka and Emporia to Evans, thence continuing over what is known as the Concordia branch to Superior, Nebraska, a run of about two hundred and fifty miles. One mile of this run is in the State of Missouri; ten miles of this run is in the State of Nebraska, and the remainder of it is in Kansas. This is a daily run, a Pullman sleeper passing over it each way during each twenty-four hours. Here again, the locomotive, the baggage and express cars, the smoking-car, the ordinary passenger cars, all have a *situs* in the State of Kansas for the purposes of taxation, known and recognized as such, disputed by no one. The sleeper making this run being within the State of Kansas during the entire run, except for one mile in Missouri and ten miles in Nebraska, it is claimed by the appellant company has no *situs* in the State of Kansas for taxation.

Illustrations of this character tend to show the injustice of the claim made by the appellant company. This sleeping car is entitled to receive and does receive the same protection from the State of Kansas as the locomotive and as the ordinary passenger cars making up that train. The employés of the appellant company — porter and conductor of this sleeping car — enjoy the benefit of the protection of the State of Kansas from violence and lawlessness of all character, and by reason of the protection afforded them by the State of Kansas are enabled profitably to conduct the business of their master, the appellant company.

It is stated in the bill of complaint that appellant company has over eleven hundred of these Pullman Palace cars in use over the lines of railroads within the several States and Territories, and that the appellant company has built up a large and prosperous business by reason thereof. Very few of these cars at any one time are to be found at the domicile

of the appellant company in Cook county, Illinois. If they were there kept, so as to be under the protection of the law of its domicile, the appellant company could transact very little business. It is, therefore, absolutely necessary in conducting its business on the part of the appellant company, that it should call upon the laws of nearly every one of the States for protection in its business; and if so, it would seem a matter of justice that it should to some extent share in the burdens of taxation which enable the several States to have laws and to extend protection to persons and corporations transacting business within their limits.

The first claim, therefore, of the appellant company, that the cars in question have no *situs* for the purposes of taxation within the State of Kansas, we think is ill founded. The power of the Legislature to separate for purposes of taxation the *situs* of personal property from the owner's domicile is undoubted. (*Tappan v. Merchants National Bank*, 19 Wall. 490; *Griffith v. Carter*, 8 Kas. 565; *Swallow v. Thomas*, 15 id. 58.)

The rolling-stock of a railroad company is taxable to the railroad company using and operating the same, without regard to ownership. (*Kennedy v. R. R. Co.*, 62 Ill., *supra; Huck v. C. & A. R. R. Co.*, 86 id. 352.)

The rolling-stock of a railroad is so intimately connected with the purposes and uses of the railroad track that it may be treated for all purposes of taxation as having the *situs* of the track and road-bed; and it may be treated either as personal property, or movable fixtures, or as realty, for the purposes of taxation. (*Louisville & N. A. R. R. Co. v. The State, ex rel. McCarty, Auditor*, 25 Ind. 177; *Fitchburg R. R. Co. v. Prescott*, 47 N. H. 62.)

The Legislature has the power to fix the *situs* of property

for the purposes of taxation, regardless of the common-law rule that personal property has its *situs* at the domicile of the owner. (1 Desty on Taxation, 97; *Dubuque v. Chicago, D. & N. R. R. Co.*, 47 Ia. 196; *Vanatta v. Runyon*, 41 N. J. Law, 98.)

II.

A further claim made by the appellant is, that the taxes in question upon the sleeping, dining and drawing-room cars of the appellant company within the State of Kansas are an interference with interstate commerce, and cast such a burden thereon as to make the same illegal; and that the law of Kansas providing for the assessment and collection of such taxes is unconstitutional and void as being in contravention of that clause of sec. 8 of the Constitution of the United States which gives to Congress power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Among others, the following cases are or may be relied upon by the appellant in support of this claim: *Crandall v. Nevada*, 6 Wall. 35; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Tennessee v. Pullman S. Car Co.*, 117 U. S. 51; *Pickard v. Pullman S. Car Co.*, 117 U. S. 34.

It must be confessed that the appellant company in the States of Indiana, Georgia, Colorado, Tennessee, and elsewhere, has been somewhat successful in defeating the attempts made by the Legislatures and the taxing officers of these several States to collect taxes upon the Pullman sleepers.

In the State of Iowa, however, in the case of *Pullman's Palace Car Company v. Twombly et al.*, the Circuit Court of the United States for the southern district of Iowa, by Mr.

Justice BREWER, held that the laws of the State of Iowa under which taxes similar to those in this case were levied and collected were not in contravention of the United States Constitution, and that the taxes levied under said Iowa statutes were not such a burden and taxation of interstate commerce as to invalidate them. The taxes in Iowa, as in this case under the Kansas statute, were levied simply upon the property of the appellant company as property. The broad question therefore is presented, whether or not the States by reason of this commerce clause of the United States Constitution are prohibited and debarred from levying and collecting taxes in their respective States upon property used and employed in interstate commerce. We think this question has been fully answered by this court in the case of *Minot v. Wilmington & Baltimore R. R. Co.*, 18 Wall. 206. In this case the court holds that the State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property; and that the manner in which the value of the property shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is also held that it is not for this court to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State.

Noticing the objection that the State law under consideration in that case was in conflict with the power of Congress to regulate commerce among the several States, and that it interfered with the right of transit of persons and property from one State into or through another, this court uses the following language:

"The tax imposed by the act in question affects commerce among

the States, and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result, of itself constitutes no objection to its constitutionality. As was very justly observed in this court in a recent case, 'Every tax upon personal property, or upon occupations, business, or franchise, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution.' (*State Tax on Railway Gross Receipts*, ante, 164.)

"The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports or tonnage, or transportion to other States, cannot be regarded as conflicting with any constitutional power of Congress."

In the case of *Railroad Company v. Peniston*, 18 Wall. 5, the State of Nebraska undertook to levy a tax upon the property of the Union Pacific Railroad Company which was used within the limits of the State, upon a certain fixed valuation per mile. It was urged on behalf of the railroad company, that its franchises were held from the Government of the United States, and that its property could not be taxed by the State. This position was held untenable, and in the opinion so holding this court said:

"It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government, or interfere with its operations to such an extent or in such a manner as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the constitution. To hold that, would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are and they must ever be coëxistent with the National Government. Neither may destroy the other. Hence the Federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be

extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

In the case of *The Western Union Telegraph Co. v. Texas*, 105 U. S. 460, it was held that a State tax imposed upon every telegram passing over the company's lines, whether entirely within the State of Texas, or coming from without its limits and into the State, or going from the State out of it, was void so far as related to messages coming into the State from outside of it, or going from the State to places beyond its limits, as an interference with or a regulation of interstate commerce. It was however pointed out in that case, that if it could be ascertained what telegrams were confined wholly within the State of Texas, a tax on those might be imposed by it. In the opinion of the court it is expressly stated that while the telegraph company was an instrument of interstate commerce, its property in the State was taxable the same as other property; and it was further held that the telegraph company might also be taxed by the State on account of its occupation and its business. The language of the court upon this question, found at pages 464–465 of the report, is as follows:

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States."

In the recent case of *The Western Union Telegraph Company v. Massachusetts*, 125 U. S., decided March 19, 1888, this court held that the privilege conferred upon telegraph

companies by the act of Congress granting to it the privilege of running the lines of its wires through and over any portion of the public domain of the United States, and over and along any of the military and post-roads of the United States, was merely a permissive statute, and does not imply that this permission to extend its lines along roads not built or owned by the United States carries with it any exemption from the ordinary burdens of taxation in the several States through which the wires extend. It is held that while the State could not interfere by the enactment of any statute to prevent a corporation from placing its telegraph lines along these post-roads, or stop the use of the interstate commerce carried on by means of them, nevertheless the company receiving the benefit of the laws of the State for the protection of its property is liable to be taxed upon its property, real or personal, the same as any other person would be. The court says:

> "It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

It was accordingly held that the laws of Massachusetts imposing a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State was not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by the act of Congress above referred to, Rev. Stat., § 5263; nor by the commerce clause of the constitution.

In the case of *Ratterman v. Western Union Telegraph Company*, 127 U. S. 411, this court held that a single tax assessed

under the laws of the State of Ohio upon receipts of the telegraph company which were partly derived from interstate commerce and partly from commerce within the State, and which were capable of separation, was invalid in proportion to the extent that such receipts were derived from interstate commerce, but that it was otherwise valid; again affirming the general proposition that corporations engaged in interstate commerce are not exempt from taxation in the several States within which their business is transacted. The precise question which was involved in the Massachusetts case in 125 U. S., *supra*, was not, however, involved in this Ohio case. The court, however, in this case, referring to the former one, says:

"The court held in that case that this tax, being in effect levied upon the capital stock or property of the company in the State of Massachusetts, which was ascertained upon the basis of the proportion which the length of its lines in that State bore to their entire length throughout the whole country, and not upon its messages or upon the receipts from such messages, was a valid tax."

In the *Passenger Cases*, 7 How. 283, this court, in an opinion delivered by its then Chief Justice, TANEY, held:

"That though a ship, when engaged in the transportation of passengers, is a vehicle of commerce, and within the power of regulation granted to Congress, yet it has always been held that the power to regulate commerce, as conferred, does not give to Congress the power to tax the ship, nor prohibit the State from taxing it as the property of the owner, when he resides within their own jurisdiction."

This commerce clause of the constitution, so often invoked upon questions relating to interstate commerce, was not intended by the framers of the constitution, if we may judge from the most authoritative contemporaneous expositions of the constitution at the time of its adoption, to trench upon the powers of the States in raising their own revenues by taxation of property used within their own limits. In The

Federalist, No. 32, Mr. Hamilton, commenting upon the powers of the States under the constitution, says:

"That the States would possess an independent and uncontrollable authority to raise their own revenue for the supply of their own wants; and with the single exception of duties on imports and exports, would, under the plan of the constitution, retain that authority in the most absolute and unqualified sense. And that an attempt on the part of the General Government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause in the constitution."

In the case of *Transportation Co. v. Wheeling*, 9 Otto, 273, this court by Mr. Justice CLIFFORD, after quoting the foregoing extract from The Federalist, and speaking of The Federalist as always being entitled to weight in any discussion concerning the true intent and meaning of the provisions of the constitution, makes use of the following language:

"From which it follows, if the writer of that publication is correct, that the power granted to regulate commerce did not prohibit the States from laying import duties upon merchandise imported from foreign countries; that the commercial clause (*i. e.*, the clause invoked against the license in this case) does not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the power to regulate commerce; and that the right of taxation in the States remains over every subject where it before existed, with the exception only of those expressly or impliedly prohibited."

In the case of *Pullman's Palace Car Co. v. Twombly*, *supra*, 29 Fed. Rep. 658, the exact question involved in this case was presented; and the court, by Mr. Justice BREWER, of the Eighth Circuit, after quoting the laws of the State of Iowa under which the tax in question was assessed and levied, and mentioning that sleeping-cars are not the only vehicles used in interstate commerce, and that a vast amount of the rolling-stock used on the various interstate railroads belongs to car companies, and are simply leased to the railroad companies using them, employs the following language:

"Now, as stated, the claim of complainant is that because this property is used in interstate commerce, it is exempt from State taxation at any other place than the domicile of its owner. I deny the proposition, and affirm the law to be that personal property continuously used in a State acquires a *situs* in that State for purposes of taxation, and may, at the option of the State, be subjected to an equal property tax —and that notwithstanding it be used exclusively in interstate commerce. The State is sovereign, except as limited by the Federal constitution. A sovereign may tax all property within its jurisdiction, and unless there be found in the Federal constitution some provision taking away this power, the State of Iowa may unquestionably tax this property used within its territorial limits. (*Lane Co. v. Oregon*, 7 Wall. 77; *Ward v. Maryland*, 12 Wall. 427; *Railroad Co. v. Peniston*, 18 Wall. 5.)

"The restriction on the power of the State is claimed alone by virtue of clause 3 of section 8 of article 1 of the constitution of the United States, which grants to Congress the power 'to regulate commerce with foreign nations, and among the several States.' I insist that an equal and uniform property tax is not a regulation of commerce, although it reaches to and affects property used in interstate commerce. Such a tax is not similar to a license or occupation tax. They are conditions of, or restrictions upon, the doing of the business, while the former is simply a subjection of the property employed in the business to the common burden of State support. A citizen of Canada, with his only domicile there, may build in the city of Des Moines a sleeping car. It remains idle and unused. The duty of the State to protect that property for its owner is clear, and equally clear its correlative right to subject it to ordinary taxation. To provide protection costs money, and the tax is the owner's proper payment therefor. The car may be employed in commerce, and run continuously from Davenport to Council Bluffs. The duty of protection and the right of taxation confessedly remain unchanged. Next year it extends its run across the Mississippi river to Rock Island. The duty of protection remains. Has the right of taxation gone? Must both Iowa and Illinois pay for furnishing this citizen of Canada protection to his property, and neither have a right to exact any compensation therefor? Does the regulation of interstate commerce compel such an absurdity and wrong? If the imposition of an equal and uniform property tax upon the vehicles used in interstate commerce be a regulation of commerce, the domicile of the owner and the *situs* of the property are immaterial questions. The use determines the exemption, and all such property is released from every burden of State taxation. If it be a regulation of commerce to impose such a tax in Iowa, where the property is found, it is equally so in Illinois, where the owner is domiciled. Surely such a sweeping exemption was never within the contemplation of the framers of the Federal constitution in granting the power to Congress to regulate interstate commerce."

The conclusions reached by the court in that case are summed up by Mr. Justice BREWER at the conclusion of the opinion as follows:

"My conclusion, therefore, is: (1) That property is not exempted from liability to an equal and uniform tax by the fact that it is used, either partially or exclusively, for interstate commerce; (2) that vehicles of transportation, used constantly and continuously upon a single run, acquire a *situs* for purposes of taxation independent and irrespective of the domicile of the owner; (3) such *situs* is not destroyed by the fact that the owner, owning many vehicles of like character, and having lines in various parts of the United States, transfers from time to time such vehicles from one line to another, providing a constant and continuous line of such vehicles is preserved upon the single run; (4) where such vehicles are used upon a run extending through two States, there is a *situs* for taxation in each State to a fair proportion of the value of the property so used; (5) where a State tax is assessed and levied against a railroad company owning and operating a line of road within the State, based upon the rolling-stock used by it in the operation of such road, a third party cannot enjoin the State from collecting or the railroad company from paying a portion of such tax, on the ground that a part of such rolling-stock included in such assessment is the property of such third party, and exempt from taxation."

The conclusions reached by the court in that case are the positions claimed by the defendants in this case. We think that they are eminently just. The appellant company, as we think, ought not to complain in this case if compelled to pay for the protection its property receives from the State of Kansas by sharing to some slight extent in the burdens of taxation through and by which the State of Kansas acquires the power to extend this protection to the property.

III.

We are not aware that special complaint is made of the manner in which under the laws of the State of Kansas the property of appellant company in question was assessed for taxation. The assessment was made by the State Board of Railroad Assessors under the provisions of the statute herein-

before set out in this brief, and not by the local assessors and taxing officers of the several counties through which the several lines of railroad extend over which the Pullman cars make regular trips. But we consider it not inappropriate to call the attention of the court to the fact that the constitution of Kansas differs from the constitutions of many other of the Western States in requiring only a uniform "rate" of taxation, and does not require all property which is not exempt to be taxed by a uniform rule; hence railroad property in Kansas may be assessed in one manner and other property in a different manner, and both assessments be valid. Different kinds of property may be assessed in different modes and by different officers, provided only that the *rate* at which these different officers are required to make their assessments is uniform, and the same for all. (*Francis v. A. T. & S. F. R. R. Co.*, 19 Kas. 307; *Ottawa Co. v. Nelson*, 19 Kas. 234; *Gulf R. R. Co. v. Morris*, 7 Kas. 210.) This provision is found in §1, art. 11 of the Kansas constitution, which is as follows:

"SECTION 1. The Legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for State, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least $200 for each family, shall be exempted from taxation."

In this connection it will not be improper to invite the attention of the court to the construction placed upon the statute under which the taxes are assessed and levied upon the property of appellant company by the Supreme Court of the State of Kansas. In the case of the *Commissioners of Shawnee County v. The Topeka Equipment Co.*, 26 Kas. 363, the Equipment Company was shown to be the owner of certain rolling stock consisting of locomotives, passenger cars, etc., all of which was leased to the Atchison, Topeka & Santa Fé Railroad Company, then owning and operating a line of rail-

road in Kansas from Atchison to the west line of the State. The railroad company in pursuance of the provisions of the statute hereinbefore set out, made a return of all this property to the State Board of Railroad Assessors for taxation for the year 1878. The State Board of Railroad Assessors appraised and assessed the same to the railroad company, and the State Auditor made returns to the clerks of each county in which any portion of the railroad was located, so that the property would be taxed in the counties along the line of the road. The rolling-stock in question was also assessed for taxation by the assessor of the city of Topeka, Shawnee county, to the Equipment Company. The question at issue was whether the rolling-stock of the Topeka Equipment Company, leased and operated by the Atchison, Topeka & Santa Fé Railroad Company, was properly assessed by the State Board of Railroad Assessors to the railroad company, or by the local assessor in Shawnee county to its owner, the Topeka Equipment Company; and whether or not this property should be taxed in the various counties through which the Atchison, Topeka & Santa Fé railroad is located and operated, or in Shawnee county alone, the residence and domicile of the Topeka Equipment Company, the owner of the property in question. In deciding the case, the court held as follows:

"1. Under the provisions of chapter 34, Laws of 1876, relating to assessment and taxation, a railroad company organized under the laws of this State, and operating its road within the State, must return to the Auditor of State a full list of all the rolling-stock operated by the company, whether owned or leased by the company; and the company operating or using such rolling-stock is liable for the taxes due thereon.

"2. After such list of the rolling-stock is returned to the Auditor of State, the Board of Railroad Assessors are the officials to make the assessment of such property, and the property is to pay taxes to the various counties through which the railroad is located and operated.

"3. Where a company is carrying on business in this State, and is

the owner of rolling-stock adapted for use upon railroads, and such rolling-stock is actually leased to and operated by a railroad corporation organized under the laws of this State, and operating its road within this State, such rolling-stock is to be listed with the Auditor of State by the railroad corporation, and to be assessed by the Board of Railroad Assessors, and need not be listed by the company owning the same in the county where it is doing business."

The defendant county treasurers respectfully ask for an affirmance of the judgment and decree of the court below.

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